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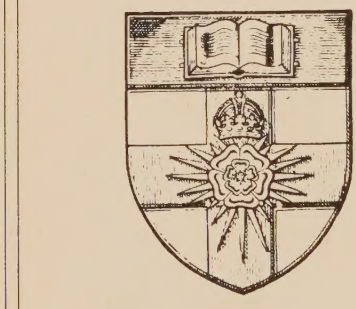

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The Right Hon. Richard R. Cherry.

King's Bench Division.

The Right Hon. Lord O'Brien, L.C.J.

The Right Hon. Christopher Palles, C. B.

The Right Hon. John George Gibson.

The Right Hon. D. H. Madden.

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REPORTERS.

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Attorney-General, Swifte *v.* 289

B.

Belfast Banking Co., Malone *v.* 187, 214
Belfast County Council, Respondents; O'Neill, Applicant, 310

C.

Carlow County Council, Conlan *v.* 535
Carse, Minford *v.* 245, 253
Clare (Justices of), R. (Hynes) *v.* 57
Coffee *v.* McEvoy, 95, 290
Commissioner of Valuation, University College, Cork *v.* 328
Commissioners of Inland Revenue, Edgeworth *v.* 606
Conlan *v.* Carlow County Council, 535
Cork County (Justices of), R. (Bransfield) *v.* 151
——— ———, R. (Donoghue and others) *v.* 64
Crane *v.* Naughten, 318

D.

PAGE

Dodd, O'Mara *v.* 55
Doyle, Brothers, Respondents; Henneberry, Applicant, 529
Dublin (Lord Mayor and Burgesses of), Respondents; Meier, Applicant, 129

E.

Edgeworth *v.* Commissioners of Inland Revenue, 606

F.

Fermanagh (Justices of), R. (Burkitt) *v.* 283

G.

Gallivan *v.* Killarney Urban District Council, 356
Geddis and Pickering, Pitner Lighting Co. *v.* 163
Grady, Killarney Rural District Council *v.* 545
Greene, Applicant; Shaw, Respondent, 430

H.

PAGE

Hanley, Tipperary Creamery Society *v.* 586
Harvey, *In re*, 170
Henneberry, Applicant; Doyle, Brothers, Respondents, 529

K.

Kildare County (Justices of), R. (Urban District Council of Athy) *v.* 64
Kilkenny County (Justices of), R. (Gorey) *v.* 1
Killarney Rural District Council *v.* Grady, 545
Killarney Urban District Council, Gallivan *v.* 356

L.

Leonard, Pender *v.* 144
London and North-Western and Lancashire and Yorkshire Railway Companies, Strabane Canal Co. *v.* 147
Londonderry County (Justices of), R. (Boylan) *v.* 374

M.

M'Carthy, O'Brien *v.* 17
McCarthy, R. (Burke) *v.* 440
McEvoy, Coffee *v.* 95, 290
M'Guirk, In the Goods of, 406
Malone *v.* Belfast Banking Co., 187, 214
Meier, Applicant; Dublin (Lord Mayor and Burgesses of), Respondents, 129
Minford *v.* Carse, 245, 253

N.

PAGE

Naughten, Crane, *v.* 318

O.

O'Brien *v.* M'Carthy, 17
O'Mara *v.* Dodd, 55
O'Neill, Applicant; Belfast County Council, Respondents, 310

P.

Pender *v.* Leonard, 144
Pitner Lighting Co. *v.* Geddis and Pickering, 163
Porter and Waine, Sandford *v.* 551

R.

R. (Hynes) *v.* Clare (Justices of), 57
— (Bransfield) *v.* County Cork (Justices of), 151
— (Donoghue and others) *v.* ————————, 64
— (Burkitt) *v.* Fermanagh (Justices of), 283
— (Urban District Council of Athy) *v.* Kildare (Justices of), 64
— (Gorey) *v.* Kilkenny County (Justices of), 1
— (Boylan) *v.* Londonderry County (Justices of), 374
— (Burke) *v.* McCarthy, 440
— (Gleeson) *v.* Tipperary County (Justices of), 61
— (McDonnell) *v.* Tyrone (Justices of), 44
— (Corcoran) *v.* Wicklow County (Justices of), 349
Ryan *v.* Tipperary (North Riding) County Council, 392

S.

PAGE
Sandford *v.* Porter and Waine, 551
Shaw, Respondent; Greene, Applicant, 430
Strabane Canal Co. *v.* London and North-Western and Lancashire and Yorkshire Railway Companies, 147
Sullivan *v.* Sullivan, 116, 125
Swifte *v.* Attorney-General, 289

T.

Tipperary County (Justices of), R. (Gleeson) *v.* 61
Tipperary Creamery Society *v.* Hanley, 586
PAGE
Tipperary (North Riding) County Council, Ryan *v.* 392
Tyrone (Justices of), R. (McDonnell) *v.* 44

U.

University College, Cork *v.* Commissioner of Valuation, 328
Ussher *v.* Ussher, 445

W.

Wicklow County (Justices of), R. (Corcoran) *v.* 349

TABLE OF CASES CITED.

A.

PAGE

Abel *v.* Lea, ... 609
Adams *v.* Ford, ... 23
Alexander *v.* Burke, 23, 29, 33, 34, 43
——— *v.* Steinhardt Walker & Co., ... 543
Allen *v.* Dundas, ... 268
Anderson *v.* Fife Coal Co., . 433
Andrew *v.* Failsworth Industrial Society, ... 434
Andrews *v.* Ross, ... 506
Anon. (2 Atk. 15), ... 278
Armitage *v.* Lancashire and Yorkshire Railway Co., . 432
Ash *v.* Ash, ... 126
Atkinson *v.* Carty, ... 385
——— *v.* Collard, . 23, 30, 40
Attorney-General *v.* Beach, . 609
——— *v.* de Preville, 609
——— *v.* Grey (Earl), 609
——— *v.* Partington, 609
——— *v.* Selborne, . 609

B.

Baird *v.* Higginbotham, . . 132
Baker *v.* Hedgecock, 590, 593, 604
Ballance *v.* Ballance, . 121, 125
Bank of Ireland *v.* Trustees of Evans, ... 220
Bannister *v.* Sullivan, . . 85
Bannon *v.* Hanrahan, . 22, 30, 43
Barker *v.* Herbert, ... 101
Barnes *v.* Nunnery Colliery Co., 532
Barnett *v.* Hickmott, . . 33
——— *v.* South London Tramway Co., ... 208
Barwick *v.* English Joint Stock Bank, . . 208, 215, 220, 223

PAGE

Beamish *v.* Beamish, 458, 460, 461, 464, 472, 473, 475, 476, 481, 482, 485, 486, 489, 494, 500, 502, 507, 513, 514, 518
Beck *v.* Pierce, ... 126
Beckley *v.* Scott, ... 131
Belfast Harbour Commissioners *v.* Commissioner of Valuation, 331, 338, 345, 346
Bell *v.* Antwerp, London and Brazil Line, ... 56
Bennett *v.* Lytton, . . 255, 266
"Bernina" The, ... 101
Bevins *v.* Hulme, . . 560, 565
Bird *v.* Holbrook, ... 110
Bishop *v.* Countess of Jersey, 207, 215, 217, 220
Bowes, *In re*; Strathmore *v.* Vane, 251, 256, 261, 270, 277, 280
Boxall *v.* Bailey, ... 41
Boydell *v.* Drummond, . . 326
Breckenbury *v.* Pell, . . . 565
Bray *v.* Ford, 563, 566, 570, 583
Brice *v.* Bannister, . 538, 539, 544
British Mutual Banking Co. *v.* Charnwood Forest Railway Co., ... 208, 215
British Thompson Houston Co. *v.* West Bros., . . . 366
Brocklesby *v.* Temperance Building Society, . 208, 219, 228
Bronker's Case, ... 384
Brook *v.* Brook, ... 523
Brooks *v.* Bagshaw, . . . 47
Brophy *v.* Holmes, . . . 373
Buccleuch (Duke of) *v.* Metropolitan Board of Works, . 373
Buckley *v.* Nesbitt, . 256, 267
——— *v.* Perk, . . 254, 263
Bunbury *v.* Fuller, . . . 7
Burland *v.* Nash, ... 170
Byrne *v.* Baltinglass Rural Council, ... 533

C.

PAGE

Callan, In the Goods of, . . 429
Carrington *v.* Roots, . . 325
Carroll *v.* Eivers, . . . 9
Catt *v.* Tourle, . . . 590
Caudle *v.* Seymour, . . . 385
Cave *v.* Cave, . . . 207, 216
Chambers' Case, . . . 388
Carter *v.* Greame, . . . 84
Christie *v.* Unwin, . . . 381
Clayton's Case, ... 167
Clements *v.* Tyrone County Council, 402, 405, 413, 418, 422
Clutterbuck *v.* Taylor, 23, 24, 25, 30
Coleman *v.* Bucks and Oxon. Union Bank, . . . 217
Colley's Patents, Limited *v.* Metropolitan Water Board, 72, 79, 84
Collins *v.* Locke, . . . 591
——— *v.* London and North-Western Railway Co., . 102
Collinson *v.* Lister, 200, 214, 220, 221, 238
Colquhoun *v.* Brooks, . . 609
——— *v.* Young, . . 31
Commissioner of Valuation *v.* Sligo Harbour Commissioners, 330, 331, 338, 339
Commissioners for Special Purposes of Income Tax *v.* Pemsel, . . 339, 347, 609
Commissioners of Church Temporalities *v.* Harrington, 257, 258, 279
Connor and Olley *v.* Belfast Water Commissioners, . 365
Conway *v.* Pumpherston Coal Co., . . . 531, 532, 533
Cooke *v.* Midland Great Western Railway Co., 102, 104, 110, 112, 113, 291, 292, 293, 294, 300, 301, 302, 303, 307
——— *v.* New River Co., . 72
Cooper *v.* Cooper, . . 123, 125
——— *v.* Crane, . . . 474
Cowley *v.* Newmarket Local Board, . . 401, 405, 417
Coyle *v.* Great Northern Railway Co., . . . 409, 424
Craske *v.* Wigan, . . . 432
Cribb *v.* Kynochs, Limited, . 131

D.

Daniel *v.* Coulsting, . . 71
Davies *v.* Rhymney Iron Co., . 433
——— *v.* Scrace, . . . 5
Davis, *Ex parte*, 378, 382, 387, 389
Dawson *v.* Bingley Urban District Council, . . 413, 415
——— *v.* M'Clelland, . . 567
——— *v.* Wallasey Local Board, 372
Day *v.* King, ... 376
Dean *v.* Allen, . . 255, 266
Deane *v.* Clayton, . . . 110
Deasy *v.* Donoghue, . . 352
De la Pole *v.* Dick, 557, 559, 560, 564
Dewar *v.* Mintoft, . . . 323
Dodd *v.* Churton, . 365, 368, 372
Dunthorne *v.* Bunbury, . . 120
Durham Brothers *v.* Robertson, 539

E.

Elliman *v.* Carrington, . . 590
E. M. Bowden's Patent Syndicate, Limited *v.* Herbert Smith & Co., . . . 539
Emerson *v.* Heelis, . . . 322
English and Scottish Mercantile Investment Co. *v.* Brunton, 216
Espin *v.* Pemberton, . . 216
European Bank, *In re*; *Ex parte* Oriental Commercial Bank, ... 216

F.

Fenna *v.* Clare, . . . 102
Fitzgerald *v.* Clarke & Son, . 432
——— *v.* Lonergan, . 256, 267
Fitzpatrick *v.* M'Glone, . 255, 268
——— *v.* Pine, . . 378
Fitzroy *v.* Bessemer, . . 207
Fitzsimons *v.* Duncan and Kemp, 569
Flower *v.* Flower, . 122, 123, 126
Forrester *v.* Norton, . . 16
Forster *v.* Baker, . . 538, 543
French *v.* Howie, . . . 126

G.

Galliard *v.* Sexton, . . . 53
Gautred *v.* Egerton, . . 110
Gay *v.* M'Gill, . . . 41
Gerard *v.* Lewis, . . . 541
Geswood, *In re*, . . . 5, 15
Gilbert *v.* Owners of S.S. "Nizam," 437
Gilmour *v.* Dorman, Long, & Co., 433

PAGE

Ginger, *In re*; *Ex parte* London and Universal Bank, 170, 171, 172, 173, 176, 177, 181, 182, 183, 184, 185, 186
Godson *v.* Dartford Justices, . 74, 75
Goodyear *v.* Weymouth (Corporation of), . . . 373
Gossett *v.* Howard, . . . 381
Gozney *v.* Bristol Trade and Provident Society, . . 589
Grady *v.* Hunt, . . . 385
Grand Trunk Railway of Canada *v.* Barnett, 101, 104, 111, 292, 293, 302
Grant *v.* Norway, . . . 207
Gray *v.* Johnston, . 199, 200, 216
Great Northern Railway Co. *v.* Harrison, ... 104
Great Southern and Western Railway Co. *v.* Gooding, . 46
Gresley *v.* Adderley, . . 278
Groom *v.* Blake, . . . 278

H.

Halpin *v.* Rice, . . . 90
Harbinson *v.* Armagh County Council, . . . 402, 405
Harding *v.* Brynddu Colliery Co., ... 532
Haren *v.* Archdale, . . . 101
Harken, *Ex parte*, . . 75, 90, 387
Harrison *v.* Duigenan, . . 278
——— *v.* Harrison, . 124, 126
Harrod *v.* Harrod, . 474, 518, 519
Hasson *v.* Chambers, 22, 30, 33, 34
Hayes, *In re*, . 172, 176, 182, 185
Haylock *v.* Sparke, . . 385, 386
Heaven *v.* Pender, . . . 108
Helier *v.* Casebert, . . 254, 262
Herd *v.* Summers, 129, 132, 135, 138, 140, 143
Hewitt *v.* Owners of S.S. "Duchess," . . . 435
——— *v.* Spiers and Pond, . 565
Hill *v.* Tottenham Urban District Council, 402, 405, 413, 418
Holme *v.* Guppy, . 371, 372, 373
Hopwood *v.* Whaley, 252, 254, 271, 280
Horner *v.* Graves, . . . 595
Hornidge *v.* Wilson, 252, 258, 263, 273, 280
Huggett *v.* Miers, . . . 294
Hughes *v.* Pump House Hotel Co., ... 539

I.

PAGE

Ilott *v.* Wilkes, . . 110, 113
Indermaur *v.* Dames, . . 110

J.

James *v.* Ricknell, . . . 565
Jenkins *v.* Great Western Railway Co., . . 291, 294, 301
Johnson, *Ex parte*, . . . 84
Jones *v.* Foley, 102, 125, 107, 114, 293, 301
—— *v.* Humphry, . . . 539
—— *v.* North, . . . 590
—— *v.* St. John's College, 360, 365, 366, 367, 369, 371, 372, 373
Jordin *v.* Crump, . . 110, 113

K.

Kean *v.* Robinson, . . . 353
Keane *v.* Robarts, . . . 199
Keats *v.* Keats, . . . 123
Keenan *v.* Costelloe, . . 70
Kelly *v.* Kerry County Council, 434
—— *v.* Owners of the "Foam Queen," 433
Kemp *v.* Baerselman, . . 541
Kerr *v.* Baird, . . . 531
Kitchenham *v.* Owners of S.S. "Johannesburg," 431, 432, 436, 437, 438, 439
Kemp-Welch *v.* Kemp-Welch, 122
Kendall *v.* Hamilton, 126, 128, 131
Kennedy *v.* Green, . . . 215
Kennington *v.* Daniel, . . 378
Kettlewell *v.* Watson, . . 216
King *v.* Hoare, . . . 131
—— *v.* Malcott, . . . 276

L.

Ladd *v.* O'Toole, 22, 23, 24, 25, 26, 27, 30, 34, 42, 43
Laidlaw *v.* Hastings Pier Co., 365, 367
Langtry and Irwin *v.* O'Rourke, . . . 539, 544
Larkin *v.* Belfast Harbour Commissioners, . . . 9
Latour *v.* Teasdale, . . . 462
Law *v.* Redditch (Local Board of), ... 360, 361
Lawrence *v.* Harrison, . 560, 564
Lawson's Case, . . . 388

PAGE
Le Lievre *v.* Gould, . . . 109
Lloyd *v.* Grace, Smith & Co., 207, 215, 219, 243, 244
Londonderry Union (Guardians of) *v.* Londonderry Bridge Commissioners, 330, 331, 338, 345, 346
Lovelady *v.* Berrie, . . . 533
Lowery *v.* Walker, 101, 105, 107, 110, 111, 112, 113, 292, 294, 302,
Lygo *v.* Newbold, . . . 104
Lynch *v.* Nurdin, . . . 293

M.

M'Causland *v.* Murphy, . . 324
M'Clelland *v.* Manchester Corporation, . . 402, 413, 415
M'Daid *v.* Balmer, 22, 27, 38, 42, 43
M'Dowell *v.* Great Western Railway Co., . . . 298
M'Kay *v.* Commercial Bank of New Brunswick, . . . 208
M'Kee *v.* Great Northern Railway Co., ... 433
M'Keown *v.* Murray, . . 533
M'Kinnon *v.* Penson, . . 423
M'Loughlin's Estate, *In re*, . 474
M'Manus *v.* Fortescue, . . 323
M'Naul's Estate, *In re*, . . 9
M'Neice *v.* Singer Sewing Machine Co., . 436, 437, 439
M'Quade *v.* Charlton, 21, 24, 25, 28, 30, 34, 35, 36, 38, 42, 43
Maguire *v.* Corporation of Liverpool, ... 403
Manchester Trust *v.* Furness, . 216
Marron *v.* Hunter, . . 145, 146
Marten *v.* Rocke, . . 216, 217
Mercantile Bank of London *v.* Evans, ... 540
Mersey Docks Trustees *v.* Cameron, ... 331
Miles *v.* Chilton, . . . 506
Miller *v.* Hancock, . . . 294
Mitchel *v.* Reynolds, . . 596
Moir, Tenant; Blacker, Landlord, . . . 257, 265, 279
Montaignac *v.* Shitta, . . 208
Moore *v.* Boyd, . . . 330
——— *v.* Manchester Liners, 431, 436
Morell *v.* Westmoreland, . . 126
Morgan *v.* Hedger, . . . 5
Morris *v.* Colman, . . . 590
——— *v.* Salberg, . . . 565
Moss *v.* Moss, . . 475, 505, 506
Mulrooney *v.* Todd and Corporation of Bradford, . 130, 134, 140
Murley *v.* Grove, 101, 104, 111, 113, 293
Murray *v.* Scott, . . 588, 589

N.

Nelson *v.* Corporation of Belfast, ... 432, 436
Niboyet *v.* Niboyet, . . . 457
Nicholson *v.* Booth, . . 75
Nixon, *In re*; Gray *v.* Bell, . 277
Nordenfeldt *v.* Maxim Nordenfeldt Co., . . . 589, 595
Northampton Gas Co. *v.* Parnell, 367

O.

O'Carroll *v.* Hastings, . . 16
O'Flaherty, Landlord; Kelly, Tenant, ... 324
Ogden *v.* Ogden, . . . 526
Oliver *v.* Nautilus Steam Shipping Co., . . 131, 132
O'Neill *v.* O'Neill, . 121, 125, 126
O'Reilly *v.* M'Caul, . . . 294
Ottaway *v.* Hamilton, . 121, 126

P.

Page *v.* Burtwell, . . . 131
Paquin *v.* Beauclerk, . . 126
Pashby *v.* Birmingham (Mayor, &c., of), ... 372
Pearson *v.* Dublin Corporation, 206
Pease *v.* Chaytor, . . . 7
Pembroke Urban District Council *v.* Commissioners of Valuation, . . . 331, 338
Penny *v.* Wimbledon Urban District Council, . . 402, 418
Pickavance *v.* Pickavance, 44, 46, 47, 48, 49, 53
Pickering *v.* Ilfracombe Railway Co., . . . 590, 593
Pierce *v.* Corf, . . . 323, 326
——— *v.* Provident Clothing and Supply Co., 434, 436, 437, 439
Piers *v.* Piers, ... 474
Ponting *v.* Noakes, . . . 113
Price *v.* Green, . . 591, 604
Prickett *v.* Gratrex, . . 387
Priestly *v.* Fernie . . 126, 128
Purnell *v.* Great Western Railway Co. and Harris, 574, 575, 579, 558

R.

PAGE
R. (Mahon) *v.* Antrim (Justices of), . . . 376, 390
— (Johnston) *v.* Armagh (Justices of), . . 65, 74, 75, 94
— *v.* Beer, ... 16
— *v.* Bleasdale, . . . 313
— *v.* Borrowes, . . . 313
— *v.* Brampton, . . . 462
— *v.* Burke, 464, 465, 477, 512, 523, 525
— *v.* Campbell, . . . 376
— (Leonard) *v.* Carlow (Justices of), . . 547, 548, 550
— *v.* Corden, ... 5
— (Burke) *v.* Cork (Justices of), 72
— (Daly) *v.* ————, 87
— (Mahony) *v.* ————, 547
— (Sheahan) *v.* ————, 5, 9, 11, 94
— *v.* Davy, ... 14
— (Moore) *v.* Dublin (Justices of), ... 58, 59
— *v.* Dunn, 376, 282, 385, 386, 387, 388, 389
— *v.* Fielding, . . . 462
— *v.* Hemwood, . . . 313
— *v.* Higham, . . . 84
— *v.* Hughes, . . . 385
— *v.* Kelly, ... 385
— *v.* Kent (Treasurer of), . 376
— (Donnelly and others) *v.* (Kerry) Justices of), . . 352
— (U. D. C., Athy) *v.* Kildare (Justices of), . . . 156
— (Maher) *v.* Kilkenny (Justices of), ... 286
(Houlihan) *v.* King's County (Justices of), . . 547, 548
— *v.* Leeds (Mayor of), . . 7
— (M'Swiggan) *v.* Londonderry (Justices of), . . . 353
— (Orr and Others) *v.* ————, 376, 377, 378, 383, 388, 389
— (M'Ardle) *v.* Louth (Justices of), ... 69
— (Martin) *v.* Mahony, 70, 77, 384, 389
— *v.* Mallinson, . 383, 384, 390
— *v.* Marsham, . . 352, 355
— *v.* Millis, 458, 459, 461, 462, 464, 472, 481, 486, 502, 508, 513, 514, 515, 518, 519
— *v.* O'Brennan, . . 378, 382
— *v.* Padbury, . . . 84
— *v.* Pearson, . . . 390
R. (De Vesci) *v.* Queen's County (Justices of), . . 7, 353
— (Farrell) *v.* ————, 285
— (Lalor) *v.* ————, 87, 88
— *v.* Rogers, ... 9
— (Madden) *v.* Roscommon (Justices of), . . . 7
— *v.* Ryan, ... 84
— *v.* Saddlers' Co. . . . 7
— *v.* Scotton, ... 47
— *v.* Shepherd, 313, 314, 315, 317
— *v.* Tabrum, . . . 84, 86
— (Gleeson) *v.* Tipperary (Justices of), ... 60
— (Quinn) *v.* ————, . 353
— *v.* Tomlinson, . . . 84
— *v.* Townley, . . . 313
— *v.* Tregarthen, . . . 389
— *v.* Unkles, ... 46
— (Prendergast) *v.* Waterford (Justices of), . . . 74
— *v.* Welchpool (Mayor of), . 7
— (Murphy) *v.* Wexford (Justices of), ... 160
— *v.* Wilkins, . 94, 376, 378, 387, 389
— *v.* Williams, 313, 314, 316, 317
— *v.* Yorkshire, West Riding (Justices of), . . . 352
Rainbow *v.* Howkins, . . 323
Ramie *v.* Irving, . . . 590
Rathvilly Presentment, *In re*, 60
Reed *v.* Great Western Railway Co., ... 533
Rendall *v.* Andreae, . 256, 279
Rice *v.* Shepherd, . . . 126
Rice, *In re*, ... 75
Richards *v.* May, . . . 373
———— *v.* McBride, . . 609
Richardson *v.* Methley School Board, ... 7
Rider *v.* Wood, . . . 15
Roberts *v.* Bury Commissioners, 371, 372
———— *v.* Humphreys, . 5, 9, 11
Robey *v.* Snawfell Mining Co., 56
Rowland *v.* Wright, . . 434
Ruben *v.* Great Fingall Consolidated, ... 215
Rubory *v.* Stevens, . . 254, 263
Rudyard's Case, . . 382, 388
Russell *v.* Amalgamated Society of Carpenters and Joiners, 589, 595
———— *v.* Bandeira, . . 371
———— *v.* Devon (Men of), 401, 405, 413, 423
Russo-Chinese Bank *v.* Li Yau Sam, ... 207, 219

S.

	PAGE
Sanders *v.* Sanders,	122
Schofield *v.* Mayor, &c., of Bolton,	292, 294
Scott *v.* Baring,	352
—— *v.* Sebright,	457, 470
Shields *v.* Bank of Ireland,	199, 239
Shoreditch (Mayor of) *v.* Bull,	402, 406, 413, 415, 416, 417, 419, 422, 423
Short *v.* Wright,	23, 31, 41
Simmons *v.* Heath Laundry Co.,	533
Simpson *v.* Ready,	9
Skipper and Tucker *v.* Holloway and Howard,	538, 542, 543
Slattery *v.* Dublin, Wicklow, and Wexford Railway Co.,	409
——— *v.* Naylor,	589, 590
Smith and Belfast Corporation, *In re*,	373
Smith *v.* Trimble,	562
Sottomayer *v.* De Barros,	506
South Western Suburban Water Co. *v.* Marylebone Union,	72
Spackman *v.* Miller,	172, 175, 176, 183, 184, 185
Stanley, *In re*,	170, 171, 172, 173, 175, 178, 183, 184, 185
Steuart *v.* Robertson,	470
Steward *v.* Gromet,	384
Stocken *v.* Pattrick,	126
Stone *v.* Yeovil (Corporation of),	8
Stribling *v.* Halse,	18, 22, 23, 28, 29, 30, 31, 33, 34, 35, 36, 37, 40, 44
Sullivan *v.* Creed,	102
Sutton *v.* Rees,	257, 265, 278
Swaine *v.* Wilson,	589
Swift *v.* Kelly,	505

T.

	PAGE
Tailby *v.* Official Receiver,	542
Tait *v.* Beggs,	570
"Tasmania," The,	569
Taylor *v.* Humphries,	5
Thelwall *v.* Yelverton,	465, 525
Thomas *v.* Brigstocke,	278
Thompson *v.* Bell,	205, 217, 219, 243
——— *v.* Cartwright,	216
——— *v.* Percival,	169
Thorne *v.* Heard and Marsh,	223
Tipping *v.* Johnson,	565
Tolhurst *v.* Associated Portland Cement Manufacturers,	541
Tom Shaw & Co. *v.* Moss Empires, Limited, and Bastow,	538
Tuck & Sons *v.* Prenter,	6
Tunnicliffe *v.* Tedd,	46
Turner *v.* Rookes,	126
Turner's Case,	5, 15

U.

	PAGE
Underwood & Son *v.* Barker,	594
United Service Share Purchase Society, Limited, *In re*,	590

V.

	PAGE
Vane's Case,	385
Vaughton *v.* Bradshaw,	46

W.

	PAGE
Wadsworth *v.* Smith,	373
Waldy *v.* Gray,	216
Wallace *v.* Barnes,	31
——— *v.* Borrie,	23, 41
Waller *v.* Barrett,	255
Walters *v.* Stavely Coal and Iron Co.,	433
Weighhill *v.* South Heaton Coal Co.,	531
Westwood *v.* Secretary of State for India,	365
Whelan *v.* Moore,	531, 533
White *v.* Proctor,	322
Whitechurch *v.* Cavanagh,	208
Whitehead *v.* Palmer,	256, 262, 263, 280
——— *v.* Reader,	531
Willes *v.* Bridger,	387
William Brandt's Sons & Co. *v.* Dunlop Rubber Co.,	539, 543, 544
Williams *v.* Wigan Coal and Iron Co.,	533
Wilson *v.* Laing,	432

Y.

	PAGE
Yelverton *v.* Longworth,	525

CORRIGENDA.

Page 103, line 18 from foot, *for* "commission" *read* "omission".

Page 387, n. (6), *for* "12 A. & E. 599" *read* "12 Q. B. 1026."

CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1912.

THE KING (GOREY) *v.* THE CHAIRMAN AND JUSTICES OF COUNTY KILKENNY (1).

K. B. Div. 1911.

Oct. 30. Nov. 2, 8.

Local Government—Member of council or board of guardians—Disqualification by absence—Penalties—Local Government (Application of Enactments) Order, 1898, *Art.* 10 (3), *Art.* 12 (9), (11)—*Justices—Summary jurisdiction—Negativing exceptions—County Officers and Courts (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 56), *s.* 78—*Question, whether preliminary to jurisdiction—Conviction incorporating complaint as in summons—Power to quash on* certiorari—*Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *s.* 39—Certiorari—*Conditional order—Insufficient allegation of fraud.*

If a member of a district council or board of guardians is absent from the meetings of the council or board for more than six months, consecutively, except in case of illness or for some reason approved by the council or board, such person "becomes disqualified by absence," and is liable to the penalty mentioned in Art. 10 (3) of the Local Government (Application of Enactments) Order, 1898; and if he acts or votes after becoming so disqualified, he is liable to the penalties mentioned in Art. 12 (11). The disqualification arises as

(1) Before PALLES, C.B., and GIBSON and BOYD, JJ.

K. B. Div. 1911.

THE KING (GOREY) *v.* JUSTICES OF KILKENNY.

regards such person on the expiration of the six months, and it is not necessary that the council or board should have declared the office vacant.

It is not necessary in a summons to recover such penalties, or in a conviction founded on such summons, to negative the fact that the absence was from illness, or for a reason approved by the council or board.

The question whether or not the absence is from illness or for a reason approved by the council or board, is not one preliminary to the jurisdiction of the Justices, but is part of the merits; and on *certiorari* to quash a conviction evidence is not admissible to show that in fact the absence was from illness, or for a reason approved by the council or board.

Notwithstanding that s. 39 of the Petty Sessions (Ireland) Act, 1851, precludes objection to a summons, in cases of summary jurisdiction, for any defect in substance or form, and that the order book prescribed by the Lord Lieutenant in Council provides that a conviction is to state the cause of complaint "as set forth in the summons," it is necessary that a conviction should on its face show an offence.

One of the grounds set out in a conditional order for a writ of *certiorari* to quash a conviction at petty sessions was, "that facts were suppressed at the hearing which, if disclosed, would have ousted the jurisdiction of the Justices."

Held, that this could not be read as alleging that the suppression was that of the complainant in the summons, or that it was wilful or fraudulent, and that it was not open to the prosecutor to show that the conviction was obtained by fraud.

CERTIORARI.

The prosecutor, Denis J. Gorey, was the defendant in three summonses, in which Edward A. Hughes was complainant.

The complaint as set out in one of the summonses was "that you the said Denis J. Gorey, the above-named defendant, being one of the Guardians of the Union of Thomastown, did absent yourself from the meetings of the Board of Guardians of the said Union for more than six months consecutively, to wit, from the 16th day of June, 1910, to the 3rd day of January, 1911, which meetings were held in the Board-room, Thomastown, in the Petty Sessions District and County aforesaid, and did thereby become disqualified from holding your said office as guardian in the said Board, and that you the said Denis J. Gorey are liable to a fine of £25 for so becoming disqualified by absence as aforesaid."

The complaint as set out in another of the summonses was "that you the said Denis J. Gorey, the above-named defendant,

did act as a member of the Board of Guardians of the Union of Thomastown, at the Board-room, Thomastown, in the Petty Sessions District and County aforesaid, on the 3rd day of January, 1911, you being then disqualified by reason of your absence from the meetings of the said Board of Guardians, of which you were then a member, for more than six months consecutively, in the year prior to said date, to wit, from the 16th day of June, 1910, to the 3rd day of January, 1911, and that you the said Denis J. Gorey are liable to a fine not exceeding £20 for so acting when disqualified as aforesaid."

The complaint as set out in the third summons was "that you the said Denis J. Gorey, the above-named defendant, did act as a member of the Rural District Council of Thomastown, at the Board-room, Thomastown, in the Petty Sessions District and County aforesaid, on the 3rd day of January, 1911, you being then disqualified by reason of your absence from the meetings of the said Council, of which you were then a member, for more than six months consecutively in the year prior to said date, to wit, from the 16th day of June, 1910, to the 3rd day of January, 1911, and that you the said Denis J. Gorey are liable to a fine not exceeding £20 for so acting when disqualified as aforesaid."

The summonses were heard by the Justices at the Petty Sessions of the District of Thomastown, County Kilkenny, and the defendant was convicted in each case, and ordered to pay in respect of the first-mentioned complaint a fine of £25; and in respect of the secondly and thirdly mentioned complaints, a fine of £1 in each case. These convictions are hereinafter referred to respectively as convictions *a*, *b*, and *c*. The conviction in each case, as appeared from the certificates, recited the complaint as set out above, and went on to state that it was ordered that the defendant was convicted of the said offence, and ordered to pay for fine the sum above mentioned, with a sum mentioned for costs, and with provisions in default of payment, and awarded one-third of the fine in each case to the complainant as informer.

The prosecutor appealed from conviction "*a*" to Quarter Sessions, where the appeal was heard and the conviction affirmed. The fine of £25 was afterwards reduced by the Lord Lieutenant to the sum of £15.

K. B. Div. 1911.

THE KING (GORBY) *v.* JUSTICES OF KILKENNY.

The prosecutor obtained a conditional order for a writ of *certiorari* to quash the several convictions, and the order of Quarter Sessions affirming conviction "*a*," on the grounds, as to conviction "*a*" and the order affirming it:—1. That the said conviction was made without and in excess of jurisdiction. 2. That the Justices had no jurisdiction to impose the said fine unless and until the prosecutor had first become disqualified by absence from holding his office, which event did not occur. 3. That the prosecutor's absence was accounted for by a reason approved of by the proper authority as provided by Article 12 (9) of the Application of Enactments Order, 1898. 4. That the prosecutor's office never was vacated. 5. That if no reason for the prosecutor's absence was approved of, no opportunity was given to him of excusing or explaining his absence. 6. That the conviction was bad on its face, as not containing on its face (*a*) the necessary averments to confer jurisdiction to impose the said fine, (*b*) a statement that the prosecutor's absence was not due to illness, and that no reason for such absence had been approved of by the proper authority. 7. That facts were suppressed at the hearing which, if disclosed, would have ousted the jurisdiction of the Court to impose the said fine.

And on the grounds as to convictions "*b*" and "*c*":—1. That the said convictions were made without and in excess of jurisdiction. 2. That the prosecutor did not act when disqualified. 3. That a reason for his absence was approved of by the proper authority as provided by Article 12 (9) as aforesaid. 4. That his disqualification (if any) could only arise on his office being vacated, which event never happened. 5. That until a declaration had been made, and notice given as provided by Article 12 (10), his office never became vacated. 6. That the said convictions were bad on their face, as not containing on their face (*a*) the necessary averments to confer jurisdiction; (*b*) a statement that the prosecutor's absence was not due to illness, and that no reason for same had been approved of by the proper authority; (*c*) a statement that the necessary declaration had been made, and notice given, as provided by Article 12 (10). 7. That facts were suppressed which, if disclosed, would have ousted the jurisdiction of the Justices.

Cause having been shown against the conditional order on behalf of Edward A. Hughes, the complainant in the summonses, the present application was to make the order absolute notwithstanding cause.

Chaytor, K.C. (with him *Corvan*), for the prosecutor :—

Conviction "*a*" purports to be made under Article 10 (3) of the Application of Enactments Order, 1898, which provides that where a person becomes disqualified by absence for holding a corporate office in a council or board, he shall be liable to the same fine as for non-acceptance of office, taken in conjunction with Article 12 (9) by which if a member of a district council or a board of guardians is absent from meetings of the council or board for more than six months consecutively, "except in case of illness or for some reason approved by the council or board," his office shall on the expiration of those months become vacant. Convictions "*b*" and "*c*" purport to be made under Article 12 (11) of the same order, which provides that if any person acts when disqualified, or votes when prohibited under the Order, he shall for each offence be liable on summary conviction to a fine not exceeding £20. We contend that the convictions are bad on their face, since they do not state that the absence alleged to cause disqualification did not arise from illness, or for some reason approved by the council or board: *Turner's Case* (1); *Geswood's Case* (2); *Rex* v. *Corden* (3); *Roberts* v. *Humphreys* (4); *Taylor* v. *Humphries* (5); *Davies* v. *Scrace* (6); *Morgan* v. *Hedger* (7). Section 78 of the County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56), dispensing with the necessity of negativing exceptions, does not apply to a case like the present. In *The King* (*Sheahan*) v. *The Justices of Cork* (8), Gibson, J., whose judgment was concurred in by Palles, C.B., states (p. 11) that the section does not authorize the omission of anything which is made an essential constituent part of the offence created and described. The point does not depend on the mere use of the

(1) 9 Q. B. 80.
(2) 2 E. & B. 952.
(3) 4 Burr. 2279.
(4) L. R. 8 Q. B. 483.
(5) 17 C. B. (N. S.) 539.
(6) L. R. 4 C. P. 172.
(7) L. R. 5 C. P. 485.
(8) [1907] 2 I. R. 5.

K. B. Div. 1911.

THE KING (GOREY) v. JUSTICES OF KILKENNY.

words "except," &c. He lays down as the test:—"Does the statute make the act described an offence subject to particular exceptions, qualifications, &c., which, where applicable, make the *prima facie* offence an innocent act? Or does the statute make an act, *prima facie* innocent, an offence when done under certain conditions? In the former case the exception need not be negatived; in the latter, words of exception may constitute the gist of the offence." In the present case the words "except in case of illness," &c., form part of the description of the offence, and an essential part of it, the offence being not absence *per se*, but an absence not due to illness, &c.

We further submit that there is no such thing as disqualification by absence. The consequence of absence is, not to disqualify, but to cause the office to become vacant: Article 12 (9) of the Application of Enactments Order, 1898. That Article specifies with particularity the different disqualifications, but nowhere mentions absence as a disqualification; and clause 10 draws a clear distinction between disqualification and vacating a seat for absence. No doubt Article 10 (3) purports to create the offence of disqualification by absence. This, however, is a mistake of the draftsman. The clause is evidently taken from the corresponding English enactment, section 39 of the Municipal Corporations Act, 1882, though with the omission of the important word "so" before the word "disqualified"; and the draftsman of the Irish Article overlooked the fact that the English section expressly makes absence a disqualification, while under the Irish code the effect of absence is not to disqualify, but to cause the seat to become vacant. An enactment cannot be extended to meet a case for which provision has not been made, even if the omission arises from forgetfulness: Hardcastle on Statutes, 4th ed., p. 71. This is a penal clause and must be construed strictly. If there is a reasonable interpretation which will avoid the penalty in any particular case, that construction must be adopted: *Tuck & Sons* v. *Prester* (1), *per* Lord Esher, M.R.

Even if absence may cause a disqualification, such disqualification does not occur until the office has been declared to be

(1) 19 Q. B. D. 629, at p. 638.

vacant: Article 12 (10); *Reg.* v. *The Mayor of Leeds* (1); *Reg.* v. *The Mayor of Welchpool* (2). And the defaulting member must first be given an opportunity of explaining or excusing his absence: *Richardson* v. *Methley School Board* (3); *R.* v. *Saddlers' Co.* (4); The Laws of England, by Lord Halsbury, vol. viii, p. 330.

Assuming that the convictions are good on their face, we propose to show, from the affidavits filed in this matter on behalf of the prosecutor, that the council in fact approved of the reasons for his absence. It is open on *certiorari* to go into evidence to show that a conviction was obtained by fraud, and the affidavits allege that there was a fraudulent alteration of the minute books of the council. [*Ronan, K.C.*: This point is not taken on the conditional order.] One of the grounds stated in the conditional order is that facts were suppressed at the hearing which, if disclosed, would have ousted the jurisdiction of the Court to impose the fine. There could not be a clearer charge of fraud; but if it is considered insufficient, I apply for leave to amend the conditional order by stating the alleged fraud more specifically. [PALLES, C.B.:— We are all agreed that the allegation in the conditional order is insufficient as an allegation of fraud, and we certainly will not allow the order to be amended by specifically stating a charge of fraud.] I submit then that, even apart from fraud, it is open to the prosecutor to show on this application that the council approved of the reason for his absence. It is a condition precedent to the jurisdiction of the Justices that the absence should not have been for a reason approved by the council, and the Justices cannot by a wrong decision on this point give themselves jurisdiction. This would be making them judges of what was sufficient excuse for absence, whereas the Legislature imposes that duty on the council or board. In such case the evidence may be reviewed on *certiorari*: The Laws of England, by Lord Halsbury, vol. x, p. 193; *Bunbury* v. *Fuller* (5), *per* Coleridge, J.; *The King* (*De Vesci*) v. *Justices of Queen's County* (6); *The King* (*Madden*) v. *Justices of Roscommon* (7); *Pease* v. *Chaytor* (8).

(1) 7 A. & E. 963.
(2) 35 L. T. (N. S.), 595.
(3) [1893] 3 Ch. 510.
(4) 10 H. L. Cas. 404.
(5) 9 Ex. 111, at p. 140.
(6) [1908] 2 I. R. 285.
(7) [1906] 2 I. R. 173.
(8) 3 B. & S. 620.

K. B. Div. 1911.

THE KING (GOREY) v. JUSTICES OF KILKENNY.

Ronan, K.C., contended that the question whether or not the absence was for a reason approved by the council was part of the merits, and not collateral; and that evidence was not admissible on *certiorari* to show that the council had approved of the reason of the absence.

[PALLES, C.B. :—We have no doubt that the question is not one preliminary to jurisdiction, but is part of the merits; and, therefore, we refuse to allow affidavits to be read for the purpose of showing that the absence was for an approved reason.]

Ronan, K.C., and *De Renzy*, for Edward A. Hughes:—

As to the contention that absence is not a disqualification, to hold this would lead to the result that no effect is to be given to Article 10 (3) of the Application of Enactments Order, 1898. This is a construction that the Court should not adopt. It is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament: *Stone* v. *Corporation of Yeovil* (1), *per* Brett, J. We submit that the reasonable construction to be given to the words "disqualified by absence," is, that they mean that the office has become vacant by absence, as provided in Article 12 (9). It is clear that in the corresponding English enactment, sect. 39 of the Municipal Corporations Act, 1882, absence causes disqualification. By giving a similar construction to the Irish enactment it is made reasonable and consistent. The word "so" is inserted in the English section before the word "disqualified" because the disqualification is created in a previous sub-section; it is omitted in the Irish enactment because the disqualification is contained in a subsequent Article.

By Article 12 (9) the office is declared to become vacant, and the disqualification accordingly arises, on the expiration of the six months; it is not therefore necessary, so far as regards the liability to penalties of the defaulting member, that the council or board should declare the office vacant. Such declaration is required merely with a view to an election to fill the vacant office.

(1) 1 C. P. D. 691, at p. 701.

As to the form of the convictions, we contend that it is not necessary to negative the matters of exception mentioned in Article 12 (9). The case comes within sect. 78 of 40 & 41 Vict. c. 56. The English cases, prior to the corresponding English enactment, 42 & 43 Vict. c. 49, sect. 39, may be disregarded: *per* Blackburn, J., in *Roberts* v. *Humphreys* (1), a decision on a similar section in a licensing Act. The offence here is constituted by absence, and the fact of illness or approved reason is merely a matter of excuse—matter which is peculiarly within the knowledge of a defendant, and the onus of proving which lies on him. It is not necessary to negative matters the onus of proving which lies on the defendant: *The King* (*Sheahan*) v. *Justices of Cork* (2), *per* Gibson, J. (p. 11). [They also referred to 11 & 12 Vict. c. 43, sect. 14; 14 & 15 Vict. c. 93, sect. 20, sub-sect. 1.]

But we further submit a wider proposition, namely, that as the law now stands no objection can be taken to a conviction on the ground that an offence is not sufficiently stated, where the conviction is in the usual form, reciting the complaint as in the summons. By sect. 11 of the Petty Sessions (Ireland) Act, 1851, the summons is to state shortly the cause of complaint; and section 39 provides that no objection is to be taken to a summons for any alleged defect in substance or form. According to the form of order book prescribed by the Lord Lieutenant in Council, the conviction is to state the cause of complaint "as set forth in the summons." It follows, therefore, that as no objection can be taken to the summons, no objection can be taken to the conviction based on it. This may seem a startling result, and is no doubt opposed to the present practice on *certiorari*, but where the construction of a statute is clear it must prevail against any practice: *In re M'Naul's Estate* (3).

Corvan, in reply, referred to *Carroll* v. *Eivers* (4); *Rex* v. *Rogers* (5); *Simpson* v. *Ready* (6); *Larkin* v. *Belfast Harbour Commissioners* (7).

(1) L. R. 8 Q. B. 483, at p 488.
(2) [1907] 2 I. R. 5.
(3) [1902] 1 I. R. 114.
(4) I. R. 7 C. L. 226.
(5) 2 Camp. 654.
(6) 12 M. & W. 736.
(7) [1908] 2 I. R. 214.

K. B. Div. 1911.

THE KING (GOREY) *v.* JUSTICES OF KILKENNY.

Nov. 8.

PALLES, C.B. :—

This is an application for a *certiorari* to bring up, for the purpose of being quashed, three convictions of the prosecutor. Of these, one is for £25, for becoming disqualified by absence as a rural district councillor; and the second and third, which are for £1 each, for acting as district councillor and guardian, respectively, when disqualified. The conviction for becoming disqualified by absence was affirmed by the County Court Judge.

Two of the objections urged against these convictions were disposed of during the arguments. We held—(1) that whether the absence was "in the case of illness or for some reason approved by the council, board, or commissioners," within the meaning of Article 12, sub-article 9, of the Schedule to the Application of Enactments Order, 1898, was "part of the merits" of the prosecutions, and not a condition precedent to the jurisdiction of the Justices; and therefore that we could not re-try the question whether the absence was caused by illness or for some approved reason. We also held (2) that the question whether the convictions were obtained by fraud was not open upon the conditional order. The seventh ground mentioned in that order, "that facts were suppressed at the hearing which, if disclosed, would have ousted the jurisdiction of the Justices," cannot be read as alleging that the suppression was that of the prosecutor below, or that it was wilful or fraudulent.

The other objections argued, and remaining now to be determined were—(1) That the convictions were bad, by reason of the non-averment that the absence was not caused by illness or for a reason approved by the district council or the board of guardians, or that the office had been declared vacant; and (2) as regards the last two convictions, that absence which vacated the office did not amount to a disqualification under Article 10 (3) of the Order I have referred to, at least unless and until there had been a declaration of vacancy.

I am of opinion that each of these objections fails.

The first depends upon the alleged non-applicability to the case of sect. 78 of the County Officers and Courts (Ireland) Act, 1877. This section enacts that—

"In all cases of summary jurisdiction any exception, exemption, proviso, qualification or excuse, whether it does or does not accompany the description of the offence complained of, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and if so specified or negatived no proof in relation to the matters so specified or negatived shall be required from the complainant, unless evidence shall be given by the defendant concerning the same."

As to the meaning of this section, I deem it unnecessary to refer to any of the cases cited which are prior to *The King* (*Sheahan*) v. *Justices of Cork* (1), because, as was remarked by Blackburn, J., in *Roberts* v. *Humphreys* (2), a case decided on an identical section in one of the English Licensing Acts, the language of the section, differing as it does from that of the enactments on which those prior cases were decided, renders it unnecessary to consider whether those prior decisions were correct.

In *The King* (*Sheahan*) v. *Justices of Cork* (1), the meaning and effect of the section were thus briefly explained by my brother Gibson:—"The section does not authorize the omission of anything which is made an essential constituent part of the offence created and described. The point does not depend on the mere use of the words, 'except,' &c. A prohibition against selling bread except by weight would not authorize a complaint for selling bread *simpliciter*. A summons in that form would show no offence. The test, or dividing line, appears to be this—Does the statute make the act described an offence subject to particular exceptions, qualifications, &c., which, where applicable, make the *prima facie* offence an innocent act? Or does the statute make an act, *prima facie* innocent, an offence when done under certain conditions? In the former case the exception need not be negatived; in the latter, words of exception may constitute the gist of the offence."

To apply this reasoning, we have to determine whether, on the true construction of our Local Government Act, and the above-mentioned Order, absence for six months from the meetings

(1) [1907] 2 I. R. 5. (2) L. R. 8 Q. B. 483, see p. 488.

K. B. Div. 1911.

THE KING (GOREY) v. JUSTICES OF KILKENNY.

Palles, C.B.

of a district council or board of guardians was deemed to be a wholly innocent act, or a blameworthy one, which required an excuse, and which, in the absence of such excuse, was an offence.

In my opinion, the Order in question does contemplate such an absence as *prima facie* blameworthy, as one requiring an excuse, and constitutes it an offence, unless so excused.

The system of Local Government instituted by that Act could not be effectively carried into execution unless persons who consented to be nominated to corporate offices, and were duly elected thereto, were subjected to the obligation of accepting such offices, and of performing the duties thereby imposed upon them. Article 9 (1) renders such a person liable to a fine, unless within a specified time he accepts the office. In such a case no excuse is allowed either for illness or for any other cause. But if, being elected, he declines or neglects to act, he inflicts a wrong upon his constituents even greater than that which he would have caused to them had he failed to accept; because, by having accepted, the office became full, and by continuing to hold it without acting in it, he not only renders a new election necessary (as does the refusal to accept office), but for the intervening six or twelve months (as the case may be) prevents the election of some other person presumably desirous to hold it and willing to act in it.

Accordingly, Article 12 (9) provides, not for occasional but for habitual absence from the meetings of the Board or Council, for absence from the meetings of a County Council for twelve months, or from those of a District Council or Board for six months, and makes such absence, unless excused, an avoidance of office. The subject-matters of excuse—illness or any other reason—are matters which must be within the knowledge of the councillor, and not necessarily within that of a common informer.

Upon the whole, I am of opinion that the non-attendance for the specified period is not innocent but blameworthy, and that illness or any other reason that may be considered by the Council are excuses within the meaning of sect. 78 of the Act of 1877, which need not be negatived by the conviction. So much for the first objection.

As to the second, Article 10 (3) seems to me to be conclusive.

It provides—"Where a person becomes *disqualified by absence* for holding a corporate office in a Council or Board, he shall be liable to the same fine as for non-acceptance of office, recoverable on conviction. . . ."

Unless we find some provision which works a disqualification by reason of absence, we virtually strike out this provision from the legislation; and undoubtedly such a construction is the very last at which any Court should arrive.

Now, clauses 9 and 10 of Article 12 are the only provisions which relate to the effect of absence. The words of clause 9 of that Article 12 are that "on the expiration of" the specified period of months, "his" office, *i.e.* the office of the non-attending officer, becomes vacant. This is a personal provision; a provision *quoad* him, emphasized by the use of the possessive pronoun. By clause 10 of the same Article a duty is cast on the Council or Board *forthwith* to declare the office vacant, and to notify the vacancy; and it proceeds, "and *the* office shall thereupon, *i.e.*, on the notification of the declaration, become vacant." In this latter provision there is no trace of the personal nature of the preceding clause. We thus have the period of the office becoming vacant stated differently in the two sub-articles. Some effect must be given to each provision; and I am of opinion that the difference I have pointed out between the two clauses provides the key to the interpretation, and that, *quoad* its effect on the councillor or guardian himself, the vacancy takes effect from the expiration of the specified period of months, but *quoad* others not until notification of the declaration. The personal disability of the councillor or guardian to continue to hold the office declared vacant may be popularly called a disqualification, and in order to give any subject-matter to Article 10 (3) I am of opinion that we are coerced to hold that such person "becomes disqualified by absence from holding" the office within the meaning of Article 10.

For these reasons I am of opinion that all the objections taken to the convictions fail, and that those convictions must stand.

This conclusion renders it almost unnecessary to consider Mr. Ronan's further contention, that where the subject-matter for which a conviction is had is described by reference to a summons then although that which is so described in the summons does not

K. B. Div. 1911.

THE KING (GOREY) *v.* JUSTICES OF KILKENNY.

Palles, C.B.

in substance amount to an offence, the conviction cannot be quashed on *certiorari*. The practice to the contrary, however, has been so consistently pursued since the passing of the Act of 1851 that I should not be doing my duty if, by passing it over in silence, I left it possible to suggest hereafter that the Court left the question one open for future discussion. I wish, therefore, to state very plainly that, in my opinion, the argument is wholly unsustainable. It overlooks the provision in sect. 21 of the Petty Sessions Act of 1851, that the Justices "shall make such order as shall be authorized by the Act under which the complaint is made." It is the substance of *that order* which is to be entered in the Order Book, and it is that entry which is to be deemed a conviction; therefore, if the complaint does not state that by reason of which the statute authorizes the Justices to make the order, the entry of it will not answer the description of that which is to be deemed a conviction. In the Form "D" in the Petty Sessions Act the heading relied on by Mr. Ronan is not "Cause of Complaint *as set forth in the Summons*," as he supposed it to be, but "Cause of Complaint," *simpliciter*. Thus the schedule recognizes that which is undoubted, that a summons is not essential to a conviction. That which is essential is a charge of a criminal offence. The defendant may be brought before the Court by warrant without a previous summons, or on arrest without warrant, and even when a summons is issued, the defendant may be charged with an offence different from that stated in the summons. The words relied on by Mr. Ronan are in the new Form prescribed by the Order of the Privy Council, alleged to be authorized by the 41 & 42 Vict. c. 69, sect. 11; but I need not say that no Order of the Privy Council can authorize the conviction of anyone for that which is not a crime.

In my opinion, the cause shown should be allowed, and the convictions should stand.

GIBSON, J.:—

The Articles on which the questions raised depend are adapted from the statute of 1882, c. 50, s. 39, and the statute of 1894, c. 73, s. 46. The former Act makes absence from the borough, except in case of illness, a disqualification punishable by fine as for

non-acceptance of office. The latter enactment deals with absence from meetings, and is substantially the same as Article 12, sections 9 to 11. It does not describe absence as creating a disqualification; but section 46, sub-sect. 8, makes acting when disqualified, or voting "when prohibited under this section," an offence. As the section contains no such express prohibition, the prohibition described is implied, and probably includes or refers to voting by the member whose seat has become vacant. The statute of 1882 provides that, as the result of absence, the member shall cease to hold office; the Act of 1894, that his office shall become vacant. Each statute requires the council to declare the office to be vacant, and such provision applies to disqualification under the Act of 1882, and to disqualification and vacating by absence under the Act of 1894.

Our legislation combines the two sets of statutory provisions in one organic whole, and the Court must construe the Articles as an entire enactment composed of adapted materials.

Article 10, section 3, describes absence (which must refer to absence under Article 12 (9)) as a disqualification. Article 12 (9) does not repeat the expression; but absence is contemplated as a disqualification, and is within Article 12 (11). If it was not a disqualification, the absentee might be hit by the words "voting when prohibited."

The next point is that which caused me most difficulty. Are the convictions bad for not negativing illness or reason approved by the council? They need not be negatived if section 78 of our Act of 1877 applies. Mr. Chaytor relies on *Turner's Case* (1), followed in many other cases, such as *Re Geswood* (2) and *Rider* v. *Wood* (3), where it was decided that under the statute 4 Geo. 4, c. 34, by which absence of a workman was made an offence, a conviction following the words of the Act was invalid for not negativing lawful excuse. The enactment was very severe, and the Court held that, as the want of lawful excuse was implied as an essential of the offence, this should be expressly stated in the conviction. The problem here is different. Do the

(1) 9 Q. B. 80.
(2) 2 E. & B. 952.
(3) 2 E. & E. 338.

K. B. Div. 1911. THE KING (GOREY) v. JUSTICES OF KILKENNY. Gibson, J.

words of apparent exception or excuse in Article 12 (9) constitute conditions or essentials of the offence? or are they defences to what is contemplated as a *prima facie* offence? For the reasons stated by my Lord, I think that the latter view is correct, and that section 78 of the Act of 1877 applies. The onus of proof is plainly cast on the defendant, and absence for the prescribed period is *primâ facie* deemed wrongful and punishable.

A further point was, that a declaration of vacancy was an essential preliminary to prosecution. But such declaration is prescribed in case of disqualification as well as absence, and it is required for the purpose of filling the vacant office: *R.* v. *Rowlands* (1). Whether such declaration is made or not, the penal consequences *in personam* attach, and the disqualified member can be prosecuted, or may be challenged by *quo warranto*: *O'Carroll* v. *Hastings* (2): *R.* v. *Beer* (3); *Forrester* v. *Norton* (4). A prosecution or *quo warranto* gives a defendant a full opportunity of being heard. Probably a declaration of vacancy could not be made—at least where there had been no previous judicial determination—without notice to the impeached member. But it is impossible to make the right to prosecute a disqualified member depend on the action or inaction of the council. They act with a view to election and not to punishment. Whether the council could approve of a reason for absence after the expiration of the six months, when the seat becomes there and then vacant, is a question not now before us. Possibly they could not—but in any view a prosecution cannot be met by anything short of proved illness or reason accepted by the council.

The matters of excuse are plainly part of the legal merits, and do not go to jurisdiction.

Assuming that (contrary to my opinion) the non-existence of illness or approved reason was an integral part of the offence, Mr. Ronan argued that, by the Petty Sessions Act, the omission of the summons to negative illness or reason would not vitiate the conviction. This argument is absolutely untenable, and is

(1) [1906] 2 K. B. 292.
(2) [1905] 2 I. R. 590.
(3) [1903] 2 K. B. 693.
(4) [1911] 2 K. B. 953.

contrary to the established practice of the Court, and an unbroken sequence of authorities. To support a conviction, there must be a valid charge, and whether such charge is contained in a summons, or information, or is made *ore tenus*, the record, the order book, must show an offence. The Justices are given wide powers of amendment under the Petty Sessions Act, before adjudication, and section 76 of the Act of 1877 purports to extend those powers after conviction or order. The order book is a compendious form of record, but it must disclose due exercise of jurisdiction—a valid complaint with an appropriate conviction.

BOYD, J., concurred.

Solicitor for the prosecutor: *Edwin M. Lloyd.*
Solicitor for Edward A. Hughes: *Nicholas Shortall.*

J. G. T.

O'BRIEN *v.* M'CARTHY (1).

Appeal 1911.

Nov. 6, 7, 20.

Parliament—Registration of voters—Service franchise—Attendant in Lunatic Asylum—Separate and exclusive occupation of room, whether as bedroom only or as dwelling-house.

An attendant in a lunatic asylum had the separate and exclusive use and occupation of a room in the asylum, primarily used as a bedroom. There are in the asylum a dining-room and recreation-room for the attendants, but each attendant is at liberty to receive guests in his own room, and it is the practice for the attendant when off duty to read in his private room and to provide himself there with food or delicacies in addition to the meals supplied in the dining-room. Each attendant has a key to his room, but the same key opens all the rooms in the block. He cannot light a fire in his room without leave of the medical superintendent. The attendants have no contractual right to any special rooms, but in practice they are never moved from one to another They use the rooms as sitting- as well as bedrooms. The furniture belongs to the asylum, but any decorations belong to the attendants. The outer gate of the asylum is closed at a particular hour at night, after which no attendant is allowed in or out without special leave. The Revising Barrister found as

(1) Before O'BRIEN, L.C.J., and LORDS JUSTICES HOLMES and CHERRY.

Appeal. 1911.

O'Brien v. M'Carthy.

a fact that the room occupied by an attendant, whose name appeared on the list of registered voters and was objected to, was a dwelling-house, and occupied as such by the attendant during the qualifying period.

Held, by Lord O'Brien, L.C.J., and Holmes, L.J., *diss.* Cherry, L.J., that there was no evidence, on which the Revising Barrister could properly act, that the occupation of the room by the attendant was as a dwelling or dwelling-house within the meaning of the Act, 48 Vict. c. 3, s. 3, or otherwise than as a bedroom merely.

Stribling v. *Halse* (16 Q. B. D. 246) is not a binding decision in this country.

Held, by Cherry, L.J, that independently of *Stribling* v. *Halse* there was, on unimpeached authorities in England and Scotland, evidence to support the finding of the Revising Barrister.

Appeal by Daniel O'Brien from the decision of Mr. Michael Comyn, Assistant Revising Barrister for the borough of Cork, retaining the names of David Browne and thirty-three other persons on the list of voters for the borough of Cork. The case stated was as follows:—

The name of David Browne, and the names of those in the schedule No. 1 hereto, appeared on the register of inhabitant householders for the registration unit of St. Mary's parliamentary polling district of St. Mary's electoral division in the parliamentary borough of Cork, and the names of those appearing in the schedule No. 2 hereto, appeared on the local government supplement for said registration unit, and were duly objected to.

Evidence was taken in the case of the said David Browne, and it was consented to between the parties that the said evidence should apply to all the other cases in the schedules hereto annexed, and that they should be consolidated with this case.

The facts proved were as follows:—

The said David Browne was a male attendant in the Eglinton lunatic asylum, which is the county asylum for the city and county of Cork, and as such he occupied a room in the attendants' quarters, attached to one of the buildings in said asylum. The said asylum is situate on ground comprising about 200 acres. It consists of at least ten buildings, which are separate and distinct from each other, and were so constructed in order that there might

be a segregation of patients according to sex, and a further segregation according to their mental condition. The said David Browne, who was an attendant in one of these buildings, had a room in a portion of that building described as the servants' quarters, and set apart for the attendants employed in that building. The Resident Medical Superintendent stated that the room was primarily used as a bedroom. He himself lived in a separate house on the grounds, and it was not suggested that he or the assistant medical officers or any person in authority lived in the same block of buildings as that which comprises the servants' quarters, in which the said David Browne's room was situate. There are in the asylum a recreation-room, which is used as a sitting-room by the male attendants, and at least one billiard-room. The attendants are at liberty to use the day-rooms of the patients as recreation-rooms when the patients are gone to bed. They are also at liberty to use the billiard-room, but this latter is also used by the patients. The male attendants have a dining-room for their own exclusive use, as have also the female attendants; and the attendants take their meals in these rooms.

There is a fireplace in each of the attendants' rooms, but no fire can be lighted except by permission of the Resident Medical Superintendent. The entire asylum, including the servants' quarters, is heated by a general system, so that there is no necessity so far as heating is concerned that a fire should be kept in any of the attendants' rooms. In the corridor adjoining the attendants' quarters in each block of building there is a gas-jet which may be used by the attendants for the purpose of cooking, or for any other domestic purpose they may require. Most of the attendants go on duty at 6 o'clock in the morning. There was no evidence before me as to how long they remained on duty, but there was evidence that their hours vary from time to time, and that they who may be on day duty for one week were liable to be put on night duty for the next week, and that while most of the attendants went on duty at 6 o'clock in the morning, a number of them should remain on duty at night. The attendants are at liberty to use the billiard-room, and the recreation-room when off duty; but each attendant in the usual rotation of hours of duty is liable to be put off duty before the patients retire to bed, so that

Appeal. 1911. O'Brien v. M'Carthy.

in case he wished to use the billiard-room when off duty he would have to mingle with the patients, and there was no evidence that the attendant when off duty was permitted to mingle with the patients. The attendants are at liberty to retire to their own rooms immediately after their duty for the day, or for the time being, is over. They use their rooms for the purpose of reading, retirement, recreation, and privacy, and they can and frequently do entertain each other in the rooms. The male attendants can entertain male friends from outside the institution in their own rooms, and the female attendants are at liberty to bring female friends; but in both cases subject to the general restriction that no person is admitted within the walls of the asylum without special leave from the Resident Medical Superintendent, or those in authority under him. The outer gate of the asylum premises is locked at 10 o'clock p.m., and no attendant is allowed in or out during the night after that hour without special leave.

Ordinary food in sufficient quantity is provided by the asylum authorities for the attendants, but there is no restriction placed upon the liberty of the attendants to provide themselves at their own expense with food or other delicacies in their own rooms. This right is sometimes availed of by the attendants, and they frequently congregate in each other's rooms—the female attendants for tea and talk, and the male attendants for social intercourse. They use the gas-jet above referred to for their own private cooking. The furniture in the rooms is the property of the institution, but the decorations in the rooms are the property of the attendants. All the attendants, and particularly the female attendants, decorate their rooms, and endeavour to make them as homelike as possible. They use them as sitting-rooms as well as bedrooms.

The attendants have no contractual right to any special rooms. The Resident Medical Superintendent has the allotment of the rooms, but the method of allotting them appears to be automatic, inasmuch as when one attendant replaces another he occupies the room vacated by the attendant whom he replaces, and continues to use that room until he is promoted or changed to another block of building in the institution. Each attendant has a key for his own room, but it appears that the same key opens the doors of all the rooms in a block. The said David Browne occupied his room for the qualifying period.

The question was whether he inhabited same as a dwelling-house. For the objector it was contended that the room was merely a bedroom, and that having regard to the decided cases in this country it was not competent for me to find as a fact that it was a dwellinghouse. On behalf of the said David Browne it was contended that the room was a dwellinghouse, and that the facts in this case were distinguishable from the facts in the cases cited on behalf of the objector, and cases were cited where attendants in a similar institution, and soldiers and policemen, had been admitted to the franchise in England and Scotland.

I found as a fact that the room in question was a dwelling-house, and was inhabited as such by the said David Browne during the whole of the qualifying period by virtue of his employment as an attendant in the said asylum, and I accordingly retained the name of the said David Browne on the register.

The question for the Court is, whether it was open to me on the facts as proved above to so find. If so, the name of the said David Browne and the names of the persons in the first and second schedules hereto annexed are to be retained on the register; but if not, the said names are to be removed from the register.

A. M. Sullivan, K.C., and *Maurice Healy*, for the appellant:—

Here there was no contractual right in the attendant to the occupation of the particular room. He was not the owner of the furniture therein. He had no control over the outer gate of the premises. Meals were to be taken in common, and there was a sitting-room to be used in common by the attendants when off duty. Moreover, the attendant had no right to light a fire in his room without leave of the medical superintendent—a most significant circumstance, depriving it of all the character of *domus*. Nor was there access to visitors without leave of the superintendent. All the four facts which were declared by the Lord Chief Justice in *M'Quade* v. *Charlton* (1) to be inconsistent with the idea of home are to be found present in this case. And his Lordship's inference from them was that, "Putting all these facts together, the occupation of the room by the claimant was inconsistent with

(1) [1904] 2 I. R. 383.

Appeal. 1911.

O'Brien v. M'Carthy.

its being his home." The error in holding occupiers of a room so circumstanced entitled to the franchise originated with the English decision of *Stribling* v. *Halse* (1), which, having survived judicial disapproval both in England and in this country, was finally annihilated as an authority, so far as this Court is concerned, by the unanimous judgment of the full Court of Appeal in Ireland in *Ladd* v. *O'Toole* (2). In *Bannon* v. *Honrahan* (*The Nuns' Case*) (3), decided in 1899, the Lord Chief Justice, citing *Hasson* v. *Chambers* (4), clearly expressed his doubt of the authority of *Stribling* v. *Halse* (1), while holding it distinguishable from the case then under consideration.

In *M'Daid* v. *Balmer* (5), each employee by the express words of his contract of service was entitled to his room and to the sole control over it. He could not be moved to another room without his consent, and he had a latchkey for the outer door, which would not be locked if any of the employees were out.

M'Sweeny, K.C., and *James Rearden*, for the respondent:—

We do not require or seek any assistance from *Stribling* v. *Halse* (1), which we admit is overruled in this country, where *Ladd* v. *O'Toole* (2) is, as we admit, the governing authority. But we say that this case is distinguishable from *Ladd* v. *O'Toole* (2). The persons objected to there were members of a religious community. It was held that there was no relation of master and servant or of employer and employed existing between the members of the community and the Head of the Order, and this put an end to any claim in respect of the service franchise. Also as regards compulsory change of bedrooms, taking meals in the refectory, going to bed and getting up at appointed hours, the privilege of having meals served in the room, the rule or practice that guests were not received in the rooms, the members of the community were under much stricter control by the President than is the case here between the attendants and the superintendent. And further, the revising barrister (Mr. Ignatius J. O'Brien) stated that he would have found that the bedroom

(1) 16 Q. B. D. 246.
(2) [1904] 2 I. R. 389.
(3) [1900] 2 I. R. 455.
(4) 18 L. R. Ir. 68.
(5) [1907] 2 I. R. 345.

occupied by a member was not a dwelling-house inhabited by him, except for the decision in *Alexander* v. *Burke* (1), which he thought he was bound to follow. But the cases in England on the service franchise have gone very far. Non-commissioned officers having rooms in the barracks, occupying in some cases two rooms, in other cases a single room, were held entitled to the franchise: *Atkinson* v. *Collard* (2). So an industrial trainer occupying two rooms in a workhouse was held entitled: *Adams* v. *Ford* (3). So also Trinity College resident students. But the very point as to lunatic-asylum attendants has been decided in Scotland: *Shortt* v. *Wright* (4). In *Wallace* v. *Barrie* (5) a constable having the exclusive use of a room in a police barrack was held entitled to the franchise. The facts of that case do not differ in the minutest detail from that now before the Court. *Stribling* v. *Halse* (6) may deserve the judicial contumely it has met with. We do not want its aid. *Non tali auxilio.* But the grave question remains: Is the franchise law in this country to be different from that in England under the same, and in Scotland under substantially similar, statutes? Are several classes who in England and Scotland enjoy the franchise under the decisions of most eminent Judges to be disfranchised in this country? We say that, leaving out of sight altogether *Stribling* v. *Halse* (6), there was according to unimpeached authority evidence in this case to sustain the decision of the Revising Barrister, and that it should therefore be affirmed.

Sullivan, K.C., in reply:—

The effect of the authorities is that the evidence with regard to these cases has been standardized. If the tests established in *Ladd* v. *O'Toole* (7) and *Clutterbuck* v. *Taylor* (8) are not complied with, the party cannot be put on, or remain on, the register: *Shortt* v. *Wright* (4) proceeded on the assumption that *Stribling* v. *Halse* (6) was still a binding authority.

(1) 22 L. R. Ir. 443.
(2) 16 Q. B. D. 254; 1 Coltman, 390.
(3) 16 Q. B. D. 239.
(4) Lawson, vol. iii, pt. 10, p. 386; 48 S. L. R. 123.
(5) 24 Rettie (4th Series), 376.
(6) 16 Q. B. D. 246.
(7) [1904] 2 I. R. 389.
(8) [1896] 1 Q. B. 395.

Appeal.
1911.

O'BRIEN
v.
M'CARTHY.

LORD O'BRIEN, L.C.J.:—

This case has been very clearly stated by Mr. Comyn, the Revising Barrister; and counsel on both sides left nothing unsaid that could with propriety have been advanced.

The question is whether the respondent, who is an attendant in the Cork Lunatic Asylum, occupies a bedroom or a dwelling-house within the meaning of the relevant statutes. Is this point to be determined by the considerations which influenced the decision in *Ladd* v. *O'Toole* (1) or in the perhaps more relevant case of *M'Quade* v. *Charlton* (2)?

Mr. Comyn clearly presents the nett question when he says; "The question was whether he inhabited same" (that is, the room allotted to him), "as a dwelling-house." The question is identical with that which arose, and was determined, in *Ladd* v. *O'Toole* (1). In that case, the late Master of the Rolls, Sir Andrew Porter, is reported, at page 405 of the report, to have said: "The question really is, was there a dwelling-house? If there was no dwelling-house, the question of service or office becomes immaterial." This is the question. What, then, is the test of whether a structure is a mere bedroom or a dwelling-house?

Referring to the language used by Lord Esher and Lord Justice Lopes in *Clutterbuck* v. *Taylor* (3), a case, be it remembered, in the Court of Appeal, I am reported, at page 400 of the report of *Ladd* v. *O'Toole* (1), to have said, "Putting the test put by Lord Esher and Lord Justice Lopes in *Clutterbuck* v. *Taylor* (3), I ask—Are these incidents consistent with the ordinary idea of a dwelling-house?" That this is the test becomes plainer when the language of Lord Esher and Lord Justice Lopes is contrasted with that of Rigby, L.J., who delivered a dissenting judgment. We are of course bound by the opinion of the majority, and dissent only illustrates and emphasizes the point of the decision. Rigby, L.J., said, "The extent and nature of the part occupied is immaterial *so long as it is occupied*

(1) [1904] 2 I. R. 389.
(2) *Ibid.*, 383.
(3) [1896] 1 Q. B. 395.

separately as a dwelling." With this I quite agree, but later on in his judgment he said—"I think sleeping in a place is using it as a dwelling." It would follow from this, having regard to the conflict of opinion that existed, that merely sleeping in a room would constitute it a dwelling, that, in fact, there is no distinctive difference between a bedroom and a dwelling—that, in fact, every bedroom is a dwelling or dwelling-house; this I entirely deny.

Now, no doubt, as I said more than once during the argument, a part of a house separately occupied as a dwelling-house may be a dwelling or dwelling-house as well as a whole house. Lord Justice Fitz Gibbon, referring to the relevant statute, deals exhaustively with this in *Ladd* v. *O'Toole* (1); but whether a house is part of a house or a whole house, the subject-matter, part or whole, must have the incidents of a dwelling-house. This is the test. The facts of a particular case may of course differ absolutely. *Clutterbuck* v. *Taylor* (2) was a case of cubicles. The facts were wholly different; but according to Lord Esher and Lord Justice Lopes the test remains the same. Lord Esher asked: "Are these incidents which are consistent with the *ordinary* idea of a man's dwelling?" and later on in his judgment he asks, "*Taking them altogether*, are they consistent with the ordinary idea of a man's rights and practice in respect of his own dwelling?"

What, then, are the incidents of this particular room? Are they those which attach to a dwelling-house? Can they reasonably be regarded as the incidents, as the characteristics, of a dwelling-house? To use the language of Lord Justice Fitz Gibbon, in the case of *M'Quade* v. *Charlton* (3), at page 387 of the report—to put the same question he put:—Was there evidence upon the statements in the case to justify the finding as a *reasonable inference of fact*, either that the claimant's bedroom was a dwelling-house or that it was separately occupied as a dwelling? Was there evidence upon which the Revising Barrister could *reasonably* find that the room in question was a dwelling or dwelling-house. This is the true way to put the test, because, if there was reason-

(1) [1904] 2 I. R. 389.
(2) [1896] 1 Q. B. 395.
(3) [1904] 2 I. R. 383.

Appeal. 1911.

O'Brien v. M'Carthy.

Lord O'Brien, L.C.J.

able evidence that the room in question was a "dwelling-house," we cannot reject the conclusion of the Revising Barrister.

What, then, were the incidents of the room in question? what was its true character? The case has been read in its entirety more than once; but let me refer to its main incidents, to those incidents which are its predominant, and, if I may use the expression, its characterizing, features. The case states in so many words: "The said David Browne, who was an attendant in one of these buildings" (*i.e.* in one of the ten buildings of which the asylum consisted), "had a room in a portion of that building described as the servants' quarters, and set apart for the attendants employed in that building. The Resident Medical Superintendent stated that the room was *primarily used as a bedroom.*" Now, with reference to this passage in the case, I ask two questions: were all the sleeping apartments in all these ten buildings so many dwelling-houses? Certainly if this be so there was a wonderful accumulation of dwelling-houses, a wonderful metamorphosis of "sleeping apartments" into dwelling-houses. Take, again, the statement that the room was primarily used as a bedroom; what led, I ask, to its conversion into a dwelling-house? It was not used as a sitting-room in the ordinary sense of the term. The case states that the male attendants have a distinct dining-room for their own exclusive use, as have also the female attendants; *and the attendants, both male and female, take their meals in these rooms.* Up to the present I can discover no function which conveys the ordinary idea of a dwelling-house; everything points to a bedroom and nothing more. The attendants neither dine nor take any meal as a matter of routine in their bedrooms; though no doubt these rooms may be used occasionally as servants in houses use their bedrooms—for taking some light refreshment, or for reading, should they feel so inclined, a newspaper or some light literature; but it is to be remembered that in this case no fire may be lighted without the express permission of the Medical Superintendent; a very curious provision indeed if we are to look for a test to the ordinary incidents of a dwelling-house. No doubt the entire asylum was heated by some general system outside the particular bedrooms, or, for all I know, outside the asylum itself; but the system of heating points more to one great

establishment, to a single large institution, than to a multitude of distinct dwelling-houses separately occupied. It must be remembered, too, that no means of cooking existed in the bedrooms; it was necessary, for any such purpose, to have recourse to a gas-jet, which was situated, not in the bedrooms, but in the common corridor outside; and this gas-jet might be used either for cooking or for any other domestic purpose for which the attendants might require it.

But let me proceed. No one is allowed within the walls of the asylum without the special leave of the Medical Superintendent, or of those in authority under him. The outer gate of the asylum premises is locked at ten o'clock; and no attendant is allowed in or out after that hour without special leave. There is a limitation as to when an attendant may go out, and when he is to return. There is a limitation also as to the admission of strangers. What else is there? There is this. The furniture in the rooms is the property of the institution; none of the furniture belongs to the attendants; and the Medical Superintendent has the allotment of the rooms, and, as far as I see, as I said in *Ladd* v. *O'Toole* (1), the attendant has no discretion whether he will occupy them or not. No attendant specially bargained for a room here, as was done in the case of *M'Daid* v. *Balmer* (2); nor, as in that case, for the sole control of the room; and in that case, too, it must be remembered that the door was not locked on the employees; nor was it requisite that they should be in at any particular hour. In this case no doubt each attendant had a key for his room, but every key opened all the rooms in a corridor. Were all these rooms separate dwellings with identical keys? Privacy was indeed but meagrely safeguarded.

But what are alleged to be the countervailing incidents? The use by the attendants of their rooms for the purposes of reading, retirement, recreation, and privacy. But it must be remembered that privacy in a bedroom in no way indicates that such a room is to be regarded as a dwelling-house; nor does reading therein point to such a conclusion either, for nothing is more common than reading in a bedroom; in fact, all these uses are neutral

(1) [1904] 2 I. R. at p. 400. (2) [1907] 2 I. R. 345.

Appeal. 1911. O'Brien v. M'Carthy. Lord O'Brien, L.C.J.

matters. Nor must the fact be forgotten that there is in this institution a recreation room, strictly so called, and that this is used as a sitting-room. Again, it is said that the attendants are at liberty to invite their friends into their bedrooms; but this privilege is subject to permission; and further, it is said that they may indulge in what has been described as a "delicacy"; but where is this "delicacy" to be cooked? At a gas-jet in the corridor. In fact, in this particular bedroom itself (the so-called "dwelling-house") there is nothing provided which would enable the attendant to boil, or roast, or fry even an egg. And indeed it would be an anomaly that a man, while, it may be, in rude health and not in any way requiring the services of a doctor, should not be able to have his meals, or even his dinner, cooked in what was argued to be his dwelling-house, without the permission of the Resident Medical Superintendent. It is stated also that the female attendants sometimes congregate in their bedrooms for "tea and talk"; tea is no doubt an exhilarating beverage, and the talk of female attendants, even when they do not criticize their superiors, is not always uninteresting; but I am afraid these matters afford no assistance with reference to the matter in hand. As regards tea, so far as I can see, there was in these rooms no apparatus whatever even for the boiling of water.

The error which lay at the root of some of the English cases was the fact that they followed the case of *Stribling* v. *Halse* (1), which, though constantly disparaged and discredited in England, was never formally overruled there, but so far as Ireland is concerned was overruled in the most formal and authoritative way in the well-known case of *Ladd* v. *O'Toole* (2). There the whole Court was convoked to review that case, and after a most exhaustive argument it was overruled by the concurrent judgments of Sir A. Porter, M.R., the Lord Chief Baron, Fitz Gibbon, L.J., Walker, L.J., Holmes, L.J., and myself. In that case I find I am reported to have said, at p. 403: "Now before I refer to the case of *M'Quaide* v. *Charlton* (3) I would like to say why I think *Stribling* v. *Halse* (1) is wrong. I think the Judges proceeded

(1) 16 Q. B. D. 246.
(2) [1904] 2 I. R. 389.
(3) [1904] 2 I. R. 383.

on the view that once it was found there was separate occupation of a bedroom, it followed that it was separate occupation of a dwelling-house. This is the fundamental error. Separate occupation of a room in which a person sleeps may be an element in determining whether it is a bedroom strictly so called, or a dwelling; but it does not necessarily follow because a room is separately occupied as a sleeping apartment that the room so occupied is a separate dwelling. The principle of the decision, the *ratio decidendi*, in *Stribling* v. *Halse* (1) was, in my opinion, and with very great deference to the eminent Judges who took part in the decision, wrong."

The Lord Chief Baron, commenting on what I have read, says, at page 410: "I am further of opinion that *Alexander* v. *Burke* (2) was wrongly decided, and as I understand this Court now overrules it, and as I know that this Court was summoned to decide whether *Stribling* v. *Halse* (1) was rightly decided, I have no hesitation in adding that I agree with my colleagues on this point. The first time that that case was cited in the Court where I was sitting, I stated my opinion that it was wrongly decided, and indeed every member of this Court has at one time or another expressed the same opinion. I entirely agree with what the Lord Chief Justice has said as to the reason of the error there. When the learned Judges there held that there was separate occupation of the room, then—as ancillary to determining whether that separate occupation was occupation of it as a 'dwelling-house'—they should have taken the further step of discussing the *purposes* for which it was occupied. They should have ascertained whether those purposes were all or *some only* of those for which a dwelling-house is used. This further step they did not take." Lord Justice Walker is also reported to have said at page 415: "I agree with the Lord Chief Justice that *Stribling* v. *Halse* (1) is wrong and cannot be followed. As he has pointed out, the fundamental error in that case was that, when the Judges determined on the facts proved that the bedrooms were separately occupied, they assumed that the bedrooms were separate dwelling-houses: *Alexander* v. *Burke* (2) was founded on

(1) 16 Q. B. D. 246. (2) 22 L. R. I. 443.

Appeal. 1911.

O'Brien v. M'Carthy.

Lord O'Brien, L.C.J.

Stribling v. *Halse* (1), and when the foundation is gone cannot be supported."

But I turn now to *M'Quade* v. *Charlton* (2), which perhaps more clearly than any other case defines the test as to whether a room is a bedroom or a dwelling-house. In that case I am reported to have asked: "Was this room the claimant's dwelling, or, in other words, was it his home? I use these words as convertible terms. The test here is the same as that put by Lord Esher in *Clutterbuck* v. *Taylor* (3) (the cubicle case), where he asks: 'Are these incidents consistent with the ordinary idea of a man's dwelling?' Are the facts in this case consistent with the idea of the room being the claimant's home?" Holmes, L.J., says that "there is not a particle of evidence to show that there was an exclusive occupation of this particular room as a dwelling, or, in other words, as a home." He uses "dwelling" and "home" as convertible terms.

Walker, L.J., is reported to have said in the same case: "The only ground on which the finding of the Revising Barrister was sought to be supported in the end was that the case is not distinguishable from *Stribling* v. *Halse* (1). We are not bound by that decision. Even in England it is a discredited decision, and we do not agree with it. I agree with the judgments of the Master of the Rolls and Lord Justice Fitz Gibbon, in *Hasson* v. *Chambers* (4), and I consider myself perfectly free from the authority of *Stribling* v. *Halse* (1)."

In *Bannon* v. *Hanrahan*, the *Nuns' Case* (5), it will be seen by the last passage in my judgment in *Ladd* v. *O'Toole* (6) that the ground of decision was that the whole convent was the dwelling-house, the *domus*, and not the sleeping apartment of any particular nun. This clearly appears from the passage Mr. Rearden read from my judgment in *Ladd* v. *O'Toole* (6), the last passage of the judgment.

A case relied upon by the respondent's counsel was *Atkinson* v. *Collard* (7). That case is, however, distinguishable from the present

(1) 16 Q. B. D. 246.
(2) [1904] 2 I. R. 389.
(3) [1896] 1 Q. B. 400.
(4) 18 L. R. Ir. 68.
(5) [1900] 2 I. R. 455.
(6) [1904] 2 I. R. at p. 412.
(7) 16 Q. B. D. 254.

one, owing to the fact that what was there alleged to be a "dwelling-house" consisted of two rooms, a bedroom, and a sitting-room. It is true that Mr. Justice Cave in his judgment, referring to the second case argued on that occasion, viz., that of *Ford* v. *Barnes* (1), seems to have drawn no distinction between the occupancy of one room and two rooms. His Lordship's opinion in this regard, however, was merely incidental, and in no wise formed the ground of his decision. There was another case pressed upon us, the case of *Shortt* v. *Wright* (2). The question there was whether the dwelling-house of which the claimant occupied a part was also inhabited by a person under whom the claimant served in the sense of section 3. It is plain that the question with which we are here concerned was not argued at all; for it was conceded without argument that the claimant inhabited a dwelling-house, so said Lords Ardwall and Mackenzie.

With regard, then, to Scotch cases generally, while reading with great interest and respect anything that comes from Judges so distinguished, we must nevertheless abide by the principles of our own decisions.

It was rightly said, in the argument of *Wallace* v. *Barnes* (3), that the Scotch cases were decided on the authority of *Stribling* v. *Halse* (4), which met with so much discredit in England, and was so authoritatively overruled in this country; but there is a passage in the judgment of Lord Kinnear, in *Colquhoun* v. *Young* (5), to which I entirely subscribe. He is reported to have said: "I think the cases in which it has been said that a man who has a separate bedroom in a house occupied by other people, but who takes his meals in common with other people in the house, has nevertheless a separate dwelling-house in the sense of the statute, have gone very far in the construction of the statute, so far indeed that the distinctions which have been taken appear to me to run into subtlety, some of the cases being difficult to distinguish from others in which a different judgment was given." This is the passage in Lord Kinnear's judgment to which I referred, and which entirely commends itself to me.

(1) 16 Q. B. D. 254.
(2) 3 Lawson, part 10, p. 386
(3) 16 Q. B. D. 254.
(4) *Ibid.* 246.
(5) Weekly Notes, 1898, p. 115.

Appeal. 1911.

O'Brien v. M'Carthy.

Lord O'Brien, L.C.J.

Having regard, then, to the whole case, the way Lord Esher has told us it should be looked at, to what was done and used in the particular case, the incidents within and without the particular room, I think it was nothing more or less than a bedroom, a sleeping apartment in what I believe to be a very creditable and well-conducted institution, the Cork Lunatic Asylum.

Holmes, L.J.:—

There are no statutes that come before this Court which have given rise to the consideration of more trivial technicalities and shadowy distinctions than those which confer or relate to the parliamentary franchise. The character of the questions discussed in cases arising under the Representation of the People Acts and the Registration Acts is doubtless the cause of a want of harmony in the decisions thereon. It is not only difficult to reconcile some of the judgments in this Court with judgments given by the corresponding appellate tribunal in England, but I also fear that the propositions laid down by ourselves are not always consistent.

The cases in which these differences have most frequently arisen are those which relate to what is known as the service franchise, and in which a servant or holder of an office claims a vote by reason of his occupying a bedroom in a house in which other servants or office-holders, similarly situated, occupy bedrooms. There is no doubt that in Ireland, especially in such a city as Dublin, many persons are entitled to the franchise by reason of their occupation of a single room in a house in which there are many other persons occupying single rooms in the same way. A large house is let in what is known as tenements. A man becomes tenant at a certain rent of one of the rooms, which he furnishes for himself, and which is used by him and his family. They not only sleep in it, but they live in it; and the landlord or any other person would be a trespasser if he were to enter it against the will of the tenant. Such a room is the tenant's dwelling-house or home; and it is no less so if there is attached to his tenancy as an appurtenant thereto the right to use a lavatory or some similar accommodation.

If a person claiming the service franchise is in the same position, he is equally entitled to a vote, provided his master does not live on the premises. But this is the point at which the difficulty arises. In *Stribling* v. *Halse* (1), a shop assistant occupied, by virtue of his employment exclusively, a furnished bedroom in a dwelling-house belonging to his employers. The house contained other bedrooms similarly inhabited by other persons in the same employment, and a diningroom in which the inmates of the house took in common their meals, which were provided for them by their employers. The employers did not live on the premises, but they had control over the whole house, enforced by a resident caretaker; and in these circumstances it was held by the Queen's Bench Division in England that there was sufficient inhabitancy of a dwelling-house to confer the franchise.

If this were now the law in Ireland, there is no doubt that the applicants in this case (who in my opinion are in neither a better nor a worse position than Mr. Stribling) would be entitled to be placed on the list of voters. It is still the law in England, although it has been severely criticized by English Judges. *Barnett* v. *Hickmott* (2) may be referred to as containing specimens of such criticism. In Ireland this decision has had a curious history. The facts in *Hasson* v. *Chambers* (3) were substantially identical with those in *Stribling* v. *Halse* (1), and three of the Judges of this Court allowed the vote on the sole ground that they thought they ought to follow the English decision; but Porter, M.R., and Fitz Gibbon, L.J., declined to be bound by it, and stated in elaborate judgments the grounds of their opinion that it was not law. The next case in this country is *Alexander* v. *Burke* (4). There were circumstances therein that might have been relied on to distinguish it from *Stribling* v. *Halse* (1) and *Hasson* v. *Chambers* (3); but the Court decided it, following those authorities, Morris, C.J., at the same time saying, "I am entirely opposed to these decisions, but I feel myself bound by them"—words which also represent the

(1) 16 Q. B. D. 246.
(2) [1895] 1 Q. B. 691.
(3) 18 L. R. Ir. 68.
(4) 22 L. R. Ir. 443.

Appeal. 1911.

O'Brien v. M'Carthy.

Holmes, L.J.

opinion of two other members of the Court, Fitz Gibbon, L.J., and Barry, L.J. I now come to *M'Quade* v. *Charlton* (1). That case not only in its general features, but also in its details, cannot I think be logically distinguished from the case now under consideration; but four Judges of this Court, disregarding *Stribling* v. *Halse* (2), disallowed the votes claimed. Then came *Ladd* v. *O'Toole* (3), which may be called a remarkable case. The claimants there were teachers in the French College, Blackrock, who had been placed on the voters' list in *Alexander* v. *Burke* (4), and whose names appeared in the registers of the following years down to 1903, without objection. They were, however, objected to in that year; and the Revising Barrister, although he would have disallowed the votes if he had been at liberty to do so, felt himself bound by the decision of the Court of Appeal, in respect of teachers in the same institution. *Ladd* v. *O'Toole* (3) was an appeal from this decision; and in the very peculiar circumstances, the full Court of six Judges sat, and put an end to the authority of *Stribling* v. *Halse* (2), *Hasson* v. *Chambers* (4), and *Alexander* v. *Burke* (5) in this country. The law as settled in Ireland on this subject, as I understand it, is that where a servant or holder of an office occupies a bedroom in a house provided by his employer, this circumstance does not in itself make the room his dwelling-house. It must be taken in connexion with his general mode of living; and after seeing how his time is spent, we must decide from all its incidents whether the room is his dwelling-house or only his bedroom.

The claimants in the present case are male attendants in the Cork Lunatic Asylum, and each of them occupies a room in the attendants' quarters attached to one of the twelve buildings forming the asylum. The Resident Medical Superintendent described these rooms as primarily bedrooms. The male attendants have a diningroom for their exclusive use, and they take their meals therein. There is also a recreation room, which is used as a sitting-room by them, and they are at

(1) [1904] 2 I. R. 383; 3 Lawson, 27.
(2) 16 Q. B. D. 246.
(3) [1904] 2 I. R. 389.
(4) 18 L. R. Ir. 68.
(5) 22 L. R. Ir. 443.

liberty to use a billiard-room. They have no contractual right to any special rooms. The rooms are allotted by the Resident Superintendent, who carries out the allotment in an automatic way, by giving to an attendant who replaces another the room previously occupied by the latter. When the attendant is not on duty, he can go to his own room, if he desires privacy, or to the recreation and general sitting-room. The furniture in the rooms is the property of the institution; but the attendants may, and do, in the words of the case stated, "decorate their rooms, and endeavour to make them as home-like as possible"; which means, I presume, that they place in them photographs, pictures, and other simple ornaments.

The quarters are heated by a general system; and although there is a fire-place in each room, no fire can be lighted therein without the permission of the Resident Superintendent; but there is a corridor with a gas-jet, which may be used by the attendants for the purpose of cooking, meaning, I presume, for the purpose of boiling water to make tea. An attendant often brings other attendants into his room, and offers them there some refreshments. He may be similarly hospitable to a male friend living outside the institution; but as such friend would not be admitted within the walls of the asylum without special leave from the Superintendent, I presume this privilege is rarely taken advantage of. Each attendant has a key for his own room; but as the same key opens the doors of all the rooms in a block, it is of no great value. The outer gate of the asylum is locked at 10 o'clock p.m., and no attendant is allowed in or out during the night, after that hour, without special leave. I think I have now stated not only all the material findings in the case stated, but some matters which I do not think material. Let me now compare these findings with the facts in *Stribling* v. *Halse* (1) and in *M'Quade* v. *Charlton* (2). In the first-mentioned case, thirteen persons had been employed as shop-assistants, and, in virtue of such employment, each of them inhabited solely one furnished bedroom in a dwelling-house belonging to the employers. These bedrooms were not structurally severed from the rest of the house, nor separately rated.

(1) 16 Q. B. D. 246. (2) [1904] 2 I. R. 383; 3 Lawson, 27.

Appeal. 1911. O'NEILL v. M'CARTHY. Holmes, L.J.

The house also contained a sitting- or diningroom in which the inmates took their meals in common, such being provided for them by their employers, who exercised general control by a resident caretaker over the whole of the house. As illustrative of the duties performed by the caretaker, it is stated that at a certain hour every night he locked the street door, by which alone ingress and egress from the house were obtained, after which, except under special circumstances, it was not opened to allow any of the inmates to come in or go out. Taking the essential features of the present case, I am unable to distinguish it from *Stribling* v. *Halse* (1). It is true that in the latter the servant had no key of his bedroom door; but the fact that in this case he had a key which was common to all the locks is, in my opinion, an unimportant difference. The control of the resident manager in that case does not differ in any essential point from the control of the Medical Superintendent in the present. Indeed, anyone acquainted with the authority possessed by the Resident Medical Superintendent in a county lunatic asylum over the institution and every person in it would be surprised to hear it compared with that of the caretaker of a building used for the residence of shop assistants. Absolute control must be given him in the interest of all the inmates. I attach no importance to the finding that when the attendant was not at work he could go to the bedroom for privacy, that he often brought friends into it, and that he added to the furniture some ornaments. In every case in which a servant or office-holder, entitled to board and lodging, has a room allotted to him to sleep in, privileges of this kind are a matter of course, and cannot affect the legal character of his occupation. It is now settled law in Ireland that a claimant in a similar position as that of the claimants in *Stribling* v. *Halse* (1) would not be entitled to the franchise. *M'Quade* v. *Charlton* (2) cannot be distinguished in principle from the present case. The twenty-five claimants for a vote in that case were employed in an extensive drapery business in Belfast, upon the terms that they were to be paid a yearly salary, be boarded by their employers, and have each a bedroom of his own so long as the service continued. I do not propose to

(1) 16 Q. B. D. 246. (2) [1904] 2 I. R. 383; 3 Lawson, 27.

refer to the details of that case. They cannot be distinguished on any legal principle from those in *Stribling* v. *Halse* (1) and the present case; and although the Revising Barrister held that the claimants were entitled to be admitted to the franchise, this Court decided that there was no evidence to support that decision.

The principle settled by this Court as governing this class of case does not, in my opinion, depend on small details. The question is, whether all the circumstances together are consistent with the ordinary idea of the room in which the claimant sleeps being a dwelling-house. If I am to apply the test of family life, I would refer to the common case of a father in good circumstances having some grown-up children living with him. Each of those children has a bedroom in the father's house, furnished by him, but with some ornaments added by the occupant, who often spends therein a quiet hour or two, but who dines with the family, and uses the reception-rooms in the ordinary way. In such a case to designate the bedrooms of the children as their dwellings would be absurd. The house is their home—the place in which they live; and this seems to me to be the foundation of the Irish decisions on the service franchise. Following them, I hold that the persons named in this appeal are not entitled to remain on the register. It is not necessary for me to refer to the English and Scotch authorities that have been quoted, other than *Stribling* v. *Halse* (1). On the same grounds as were relied on therein, policemen and soldiers in barracks, as well as servants and office-holders in public and private institutions, have been held entitled to the franchise, and rightly so, as the Courts in Great Britain follow their own decisions. We, in this Court, ought also to follow its decision, and the consequence is that in Ireland at present persons of the classes I have mentioned, except soldiers, are not registered.

The case of soldiers, for some reason, has never been raised or discussed in this Court, and I do not wish to anticipate the result if it ever is. We may regret that there is not uniformity of decision in all parts of the United Kingdom on questions relating to the franchise; but in existing circumstances this can only be brought about by legislation.

(1) 16 Q. B. D. 246.

Appeal. 1911. O'Brien v. M'Carthy. Holmes, L.J.

Let me say in conclusion a word about *M'Daid* v. *Balmer* (1). There is no inconsistency between the decision therein and that in *M'Quade* v. *Charlton* (2). There were differences in the facts which I thought (perhaps erroneously) were of a minor or immaterial character. It was proved in that case by the employer that it was part of the contract with the assistant that he was to have a room to himself, and the sole control of it. On such a contract the employer or any other person would have been a trespasser if he had entered the room without the consent of the occupant during the latter's time of service.

My colleagues (as I understood them) were of opinion that this distinguished the case from our previous decisions; and, although I dissented, theirs may have been the better view. It does not, however, affect the present appeal, in which there are no such evidence and no such finding.

Cherry, L.J.:—

I have the misfortune to differ from the other members of the Court in this case. In my opinion the Revising Barrister was right in retaining on the register the names of the thirty-three voters objected to; and, inasmuch as the case is one of great importance, involving the right to the franchise, not only of the parties now before the Court, but of many hundreds of other persons similarly situated throughout Ireland, I think I am bound to state my reasons for the very strong opinion I have formed; though, of course, my judgment cannot have any effect, having regard to those which have just been pronounced by the Lord Chief Justice and Holmes, L.J.

Let me say, in the first place, that I do not think any assistance can be obtained in these registration cases by appealing to principles of common sense, or to our old friend "the man in the street." The entire network of statutory provisions as to franchise and registration is so involved and so illogical that it is vain to look for any reason or common sense in these Acts, and "the man in the street" treats them with the contempt and derision which they so richly deserve.

(1) [1907] 2 I. R. 345. (2) [1904] 2 I. R. 383; 3 Lawson, 27.

Appeal.
1911.
O'BRIEN
v.
M'CARTHY.
Cherry, L.J.

But, putting aside common sense altogether, it is our duty to try and interpret the provisions of the Acts themselves, guided as far as possible by previous decisions.

The section which confers the "service franchise," namely, sect. 3 of the Representation of the People Act, 1884, provides that where a man "inhabits" any "dwelling-house" by virtue of any "office, service, or employment," and the "dwelling-house" is not inhabited by any person under whom he serves, he is to be "deemed to be an inhabitant occupier of such dwelling-house as a tenant." Now, if that section stood alone, no person in his senses would think that it applied to the voters now in question. But it does not. It must be read in conjunction with the Parliamentary Registration Act, 1878, the 5th section of which provides (1) that "the term 'dwelling-house' shall include any part of a house where that part is separately occupied as a dwelling," and (2) that "where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part."

Piecing together these three provisions, it is obvious that we have a highly artificial definition of the term "dwelling-house" which is absolutely at variance with the ordinary use of language; and we can get no help, as has sometimes been sought, in endeavouring to understand what it means, by translating it into Latin and speculating as to what a Roman citizen would have meant by his *domus*.

The Revising Barrister in all these cases is the judge of fact. He has found in the present case that each of the voters held, by virtue of his service, a room in a portion of a building described as the servants' quarters, which was primarily used as a bedroom, but was also used "for the purpose of reading, retirement, recreation, and privacy," and to which he was at liberty to retire whenever he was off duty. He was entitled to the key of his room, and although his regular meals were taken in the dining-room, no restriction was placed upon his providing himself with extra food in his room. The Revising Barrister, on these facts, decided, in point of law, that each of the servants so situated "inhabited" a "dwelling-house" within the meaning of the Act. Can we say that there was no evidence to support this finding?

Appeal. 1911. O'Brien v. M'Carthy. Cherry, L.J.

If I were to approach this question on principle, without referring to the authorities, on a mere perusal of the sections I have mentioned, I would unhesitatingly say that there was sufficient evidence to support his decision. But how stand the authorities? They are very numerous and somewhat conflicting. Counsel for the objector here urged very strongly that the interpretation put upon the Acts in Ireland was so different from that applied in England and Scotland that no help could be obtained from the English and Scottish cases. I cannot agree with this contention, nor can I find any divergence in principle between the two classes of cases. It is true that this Court has absolutely refused to follow one particular decision in England: *Stribling* v. *Halse* (1). But that case, though not distinctly overruled in England, has been so much disapproved of in subsequent cases that it can scarcely be considered an authority at the other side of the Channel any more than it is here. Apart from *Stribling* v. *Halse* (1) I can find no conflict between the decisions in the two countries, and I see no reason why we should not apply the same rules in interpreting the same statutes in Ireland as in England.

There are numerous cases to which we have been referred, dealing with servants in public institutions, public officials such as the police, and officers and soldiers living in barracks, where the circumstances are so like those of the present case that I, for my part, can see no distinction; and in all these cases, without exception, the claimants were held entitled to the franchise, provided their occupation was continuous during the qualifying period. The earliest cases in point of time are those of persons in the military service. A group of cases reported under the name *Atkinson* v. *Collard* (2) dealt with officers and non-commissioned officers in barracks, some of them occupying two rooms, and others only one, the furniture being mainly supplied by Government in each case. Each of these claimants, under military discipline, was under quite as much control as the servants here are in the asylum; nor had they, as far as I can see, any greater right to their rooms than the asylum attendants have, yet they were all held entitled to vote, except where they

(1) 16 Q. B. D. 246. (2) 16 Q. B. D. 254.

had been absent on military duty during some part of the qualifying period. The Scotch Courts followed the same rule in *Gay* v. *McGill* (1), and it was extended to the case of common soldiers in *Boxall* v. *Bailey* (2).

The same rule was applied in the case of workhouse officials in *Adams* v. *Ford* (3), and to the police in *Wallace* v. *Barrie* (4). In that case a constable residing in a police barracks had the exclusive use of a room of which he kept the key. He slept in the room, and when off duty was entitled to use it and receive visitors in it. Separate common rooms were provided in the barracks for meals and recreation. The right of the constable to the room was contingent on his remaining in the force, and the barracks were subject to the control of the chief constable, who might at any time remove the constable from barracks, order him to change his bedroom, or keep certain hours, order him to give up the key of his room on ceasing to occupy it, forbid him to receive visitors in his room, and order him to open the door so as to let any person in authority enter. Yet in spite of all this control, far greater than that exercised by the Resident Medical Superintendent in this case, and in spite also of the absolute insecurity of tenure, the policeman was held entitled to the service franchise.

But the most recent case is the strongest of all, that of *Shortt* v. *Wright* (5). There the claimant was, as here, the attendant at a lunatic asylum. The circumstances under which he occupied the room were absolutely identical with those in the present case. I cannot find, in reading the report, the most minute difference; yet there, though the sheriff had removed the man's name from the register, the Scotch Court of Session held that he was wrong, and restored the name.

It is said that these cases are not binding upon us, and of course they are not; but I certainly am not prepared to hold that men in the responsible position of lunatic asylum attendants are to be excluded from the franchise in Ireland, though they are admitted

(1) 15 R. 90; W. N. [1897], 98.
(2) 1 Coltman, 390.
(3) 16 Q. B. D. 239.
(4) 16 Q. B. D. 239.
(5) 24 R. 376; W. N. [1898] 113.

Appeal. 1911.

O'Brien v. M'Carthy.

Cherry, L.J.

in England and Scotland, unless I am coerced by authority to do so.

Are the decisions of this Court, then, at variance with all these I have mentioned in England and Scotland? I do not think they are. Two cases were chiefly relied upon as authorities against the decision of the Revising Barrister, viz., *M'Quade* v. *Charlton* (1) and *Ladd* v. *O'Toole* (2). Now, if *M'Quade* v. *Charlton* (1) stood alone, I agree that it would be a very strong authority against the view I have adopted. But it must be read in conjunction with the more recent case of *M'Daid* v. *Balmer* (3). The facts in these two cases were extremely like. In both the claimants were assistants in a drapery business, one in Londonderry and the other in Belfast. In the first case, I think, the claimants had no keys of their bedrooms; in the second they had. But I agree with the opinion expressed by Holmes, L.J., who dissented from the other members of the Court in *M'Daid* v. *Balmer* (3), that the facts proved were substantially identical. Yet the Court held (Holmes, L.J., dissenting, on the ground that the decision in *M'Quade* v. *Charlton* (1) ruled the case) that the claimants there were entitled to the franchise. Fitz Gibbon, L.J., attempted to reconcile the two cases by pointing out that in *M'Quade* v. *Charlton* (1) the Revising Barrister did not make up his mind whether there was sufficient evidence in support of the claim or not, while in *M'Daid* v. *Balmer* (3), the case then under consideration, he had admitted the claimants. "In registration cases," he says (4), "as well as in cases under the Employers' Liability Act, there may be opposite decisions on the same facts, which the Court of Appeal cannot harmonize, because it is not the tribunal of fact, and there may be sufficient evidence to sustain a finding either way. Lord O'Brien, L.C.J., took the same view. "We are not," says he (5), "assuming the functions of the Revising Barrister; we are merely seeing whether there was evidence to justify what he did."

If, therefore, *M'Quade* v. *Charlton* (1) and *M'Daid* v. *Balmer* (3)

(1) [1904] 2 I. R. 385.
(2) [1904] 2 I. R. 389.
(3) [1907] 2 I. R. 345.
(4) [1907] 2 I. R. at p. 349.
(5) *Ibid.*, p. 348.

are inconsistent with each other, I think I am bound to follow that which is the latest in date. If they can be reconciled on the ground put by both the Judges who constituted the majority of the Court, the present case falls within the same rule as *M'Daid* v. *Lalmer* (1), for here the Revising Barrister has found in the same way as he did there.

Ladd v. *O'Toole* (2) was a case so different in its facts from the present one, that I cannot regard it in any way as an authority for reversing the decision of the Revising Barrister in this case. In the first place, the view of the Revising Barrister there was against the voters, and he was only prevented from removing the names from the register by the previous decision in *Alexander* v. *Burke* (3) in reference to the same voters under the same circumstances. In the second place, the room in respect of which the claim was made was occupied solely as a bedroom by each voter, and this fact is very strongly relied upon by Porter, M.R., in his judgment. In the third place—and this is, to my mind, the most important distinction—the relation of master and servant or employer and employed did not, as the Court found in that case, exist between the members of the religious community and the Head of the Order, and so of course there could be no service franchise. All the Judges, except, I think, Fitz Gibbon, L.J., refer to this fact, and Palles, C.B., rests his entire judgment upon it. Lord O'Brien, L.C.J., puts it in very clear language. "My last observation is this," he says, "I think this case is practically decided by *Bannon* v. *Hanrahan* (4). The respondent here occupies his bedroom, as the nuns did in that case, *not by virtue of any contract or service*, but as members of the community which, like one family, occupies the French College as its dwelling-house or home It is impossible to hold that the bedrooms of the respondents are their separate dwelling-houses." (5).

For these reasons I cannot regard either *M'Quade* v. *Charlton* (6) or *Ladd* v. *O'Toole* (2) as in any way authorities against the decision of the Revising Barrister in this case, and as

(1) [1907] 2 I. R. 345.
(2) [1904] 2 I. R. 389.
(3) 22 L. R. I. 443.
(4) [1900] 2 I. R. 455.
(5) [1904] 2 I. R. at p. 403.
(6) [1904] 2 I. R. 383.

Appeal. 1911.

O'Brien v. M'Carthy.

Cherry, L.J.

there are numerous authorities in support of his view, without in any way relying upon the discredited case of *Stribling* v. *Halse* (1), I cannot agree that we ought to expunge these names from the register.

Solicitor for the appellant: *Maurice Healy.*
Solicitor for the respondent: *J. J. Horgan.*

W. G.

(1) 16 Q. B. D. 246.

K. B. Div. 1911

Oct. 26.
Nov. 8.

THE KING (McDONNELL) *v.* THE JUSTICES OF COUNTY TYRONE (1).

Justices—Summary jurisdiction—Effect of withdrawal of summons—Game laws—27 Geo. 3, c. 35, ss. 10, 19—Application of Small Penalties (Ireland) Act, 1873—Absence of information on oath.

An order of justices permitting a summons for an offence punishable on summary conviction to be withdrawn does not amount to an acquittal of the defendant, and a fresh summons may subsequently be issued for the same offence.

The statement in *Pickavance* v. *Pickavance* ([1901] P. 60, at p. 63), that the withdrawal of a summons puts an end to the complaint, dissented from.

The Small Penalties (Ireland) Act, 1873 (36 & 37 Vict. c. 82), applies to convictions for offences relating to game under 27 Geo. 3, c. 35, where the penalty adjudged to be paid does not exceed £5.

It is not necessary that, prior to issuing a summons for an offence under 27 Geo. 3, c. 35, there should be an information on oath.

Certiorari.

The prosecutor, John McDonnell, was charged as defendant in two summonses issued on the 16th February, 1911, on the complaint of John Elliott (prosecuting as a common informer), with offences under section 10 of 27 Geo. 3, c. 35. The charge in one of the summonses was that the defendant did at Legfordrum, in the Petty Sessions district of Newtownstewart and County

(1) Before Palles, C.B., and Gibson and Boyd, JJ.

Tyrone, on the 2nd August, 1910, unlawfully and not being duly authorized, enter the lands of A. K. S. M'A. Robertson, Esquire, situate at Legfordrum aforesaid, with a gun and dog, to look for game there. The other summons charged a similar offence on the same lands on the 9th October, 1910. No information on oath had been made prior to the issuing of the summonses.

On the 14th October, 1910, two summonses had been issued by the same complainant against the prosecutor as defendant in respect of the same alleged offences. These summonses had come on for hearing before the Justices at Petty Sessions on the 20th October, 1910, and the complainant then stating that he withdrew the summonses, an order was made by the Justices in each case to the following effect, viz., "withdrawn."

The summonses issued on the 16th February, 1911, were heard by the Justices at Petty Sessions on the 18th May, 1911. The defendant's solicitor objected to the charges being again inquired into, and contended that by the order made on the 20th October, 1910, the defendant had been acquitted of these charges. The Justices convicted the defendant on both charges, and ordered him in each case to pay a fine of £3, and in default of payment to be imprisoned in Londonderry Jail for one calendar month unless the fine was sooner paid. One-third of the fine when paid to go to John Elliott, the informer.

The prosecutor obtained a conditional order to quash these convictions on the grounds (*inter alia*)—(*a*) That they were bad in law having regard to the previous complaints contained in the summonses dated the 14th October, 1910, and the orders dated the 20th October, 1910; (*b*) that they were bad on their face in awarding imprisonment without previously requiring a distress upon the goods of the defendant; (*c*) that no information as required by 27 Geo. 3, c. 35, was made or proved to have been made.

Cause having been shown on behalf of John Elliott, the complainant in the summonses, against the conditional order, the present application was on behalf of the prosecutor to make the order absolute notwithstanding cause.

K.B. Div. 1911.

THE KING (McDONNELL) v. JUSTICES OF TYRONE.

Murnaghan, for the prosecutor :—

The convictions are bad on three grounds :—

1. The orders of the 20th October, 1910, operated as a bar to any subsequent proceedings in respect of the matters complained of. The effect of the withdrawal of a summons is to put an end to the complaint, and a fresh summons cannot be founded on the same complaint : *Pickavance* v. *Pickavance* (1), *per* Sir F. Jeune, in whose judgment Gorell Barnes, J., concurred. No evidence having been offered on behalf of the complainant on the hearing of the summonses of the 14th October, 1910, the defendant was entitled to have the complaints dismissed : *Tunnicliffe* v. *Tedd* (2) ; *Vaughton* v. *Bradshaw* (3). The Court should, therefore, construe the order of withdrawal as equivalent to a dismiss. In cases such as this, which do not come within the Petty Sessions (Ireland) Act, 1851, a dismiss, even without prejudice, is a bar to a subsequent prosecution for the same offence : *G. S. & W. Railway Co.* v. *Gooding* (4) ; *The Queen* v. *Uncles* (5).

2. The orders of the 18th May, 1911, are bad on their face, inasmuch as they award imprisonment in default of payment of the fines, without requiring a previous distress, as provided by section 19 of 27 Geo. 3, c. 35. The Small Penalties (Ireland) Act, 1873, section 4 of which, in cases of summary conviction coming within the section, dispenses with the necessity of a distress warrant, does not apply to proceedings under 27 Geo. 3, c. 35, which are really in the nature of proceedings to recover a penal sum, and the order made is not a conviction, but an order that the defendant shall forfeit a certain sum. Under 27 Geo. 3, c. 35, the maximum period of imprisonment which can be awarded in default of payment is one month ; under the Small Penalties Act, where the fine is between £2 and £5, two months' imprisonment may be awarded in default of payment. A general Act is not to be read as increasing the penalties in a special Act. Section 6 of the Small Penalties Act shows that the intention was to shorten, not to lengthen, the term of imprisonment awardable. Moreover, if

(1) [1901] P. 60, at p. 63.
(2) 5 C. B. 553.
(3) 9 C. B. (N. S.) 103.
(4) [1908] 2 I. R. 429.
(5) I. R. 8 C. L. 50.

the Small Penalties Act applies, the absurdity would result that if a defendant in a proceeding under 27 Geo. 3, c. 35, was fined £3, imprisonment for two months could be awarded for default of payment, whereas if he was fined £10 (the case then not coming within the Small Penalties Act) the imprisonment could not exceed one month.

3. By section 19 of 27 Geo. 3, c. 35, all offences against the Act are to be inquired into and determined either by oath or by confession of the accused. This implies that where the accused does not confess there must be an information on oath before the summons issues, and there was none in the present cases. The orders, therefore, are bad on this ground: *The Queen* v. *Scotton* (1).

Wylie, for John Elliott:—

1. In the case of the former summonses there was no adjudication by the Justices on the merits. The order "withdrawn" does not amount to such an adjudication. Two or more summonses in succession can be issued unless and until there has been a determination of the matter on the merits: *Brooks* v. *Bagshaw* (2), *per* Lord Alverstone, C.J. The observations of Sir F. Jeune in *Pickavance* v. *Pickavance* (3) were not necessary for the decision of that case, and cannot be supported, at all events in proceedings of a criminal nature.

2. The Small Penalties Act applies to convictions under 27 Geo. 3, c. 35, where the fine does not exceed £5. Nothing could be clearer than the words of section 4 of the Small Penalties Act making it applicable to penalties recoverable in a summary manner in pursuance of any Act of Parliament whether passed before or after the commencement of the Act. The express exception in section 7 of Inland Revenue cases alone, when compared with section 42 of the Petty Sessions Act, which excepts cases under the Game Acts also, shows that the latter class of cases are intended to be made subject to the provisions of the Small Penalties Act. An order under 27 Geo. 3, c. 35, imposing a fine, is a summary conviction. The word "conviction" is expressly used in

(1) 13 L. J. (N. S.) M. C. 58.
(2) [1904] 2 K. B. 798, at p. 801.
(3) [1901] P. 60, at p. 63.

K. B. Div. 1911.

THE KING (McDONNELL) *v.* JUSTICES OF TYRONE.

section 23, and throughout the Act the several matters prohibited are referred to as offences.

3. The words in section 19 of 27 Geo. 3, c. 35, requiring offences to be inquired into and determined on oath, refer to the hearing before the Justices, and not to a previous information.

Murnaghan, in reply.

Nov. 8.

PALLES, C.B.:—

In my opinion, the permission given by the Justices to withdraw the first complaint did not amount to an acquittal. The order involved no more than the consent of the Justices that the question of the guilt or innocence of the defendant in the summons should be withdrawn from their cognizance, that is, that they should not adjudicate upon it. There was, therefore, an absence of adjudication; whilst, to amount to an acquittal, it was necessary that there should be an adjudication on the merits. The withdrawal had not, in my opinion, any greater effect than that which a *nolle prosequi* has in proceedings by indictment, and that undoubtedly, would not be an answer to a subsequent indictment for the same offence.

Pickavance v. *Pickavance* (1) when carefully considered will be found not to be *an authority* for the defendant. The real *ratio decidendi* there was that the complaint acted upon by the Justices in making the order appealed from was the second one, and that "that was out of time"—in other words, that by reason of the expiration of six months from the cause of complaint the jurisdiction of the Justices to make the order appealed from had ceased. As a *decision* therefore it is not in point here. However, the very eminent Judges who composed the Court are reported to have expressed the opinion that the withdrawal of a summons by the leave of the Court in these cases involved "the *obvious* effect that the complaint upon which the summons was founded *necessarily* falls to the ground." It is said that the words "in these cases" mean and include all cases before Justices, and that the words I have cited lay down a general rule as to the administration of criminal laws by Justices. I desire to say that in cases such as that of

(1) [1901] P. 60.

Pickavance v. *Pickavance* (1), viz., cases of separation between husband and wife, in which the question of condonation so frequently arises, the withdrawal of a summons may have the effect attributed to it. The introduction into the second sentence of Sir Francis Jeune's judgment of the words "in this case," which limit his opinion as to the effect of the withdrawal of a summons to that particular case, and the form of the head-note, seem to indicate a desire to restrict the effect of some more general expressions in the judgment.

If, however, we apply the principle laid down in that decision to the withdrawal of any summons for a criminal offence, we would impose a fetter upon the administration by Justices of the criminal law, which derives no support either from statute or from analogy in the common law; and to do so would, in my opinion, be opposed to the long line of authorities which define and limit the application of the common law pleas of "*auterfois convict*" and "*auterfois acquit.*"

To support such a momentous decision, Sir Francis Jeune, in giving judgment in *Pickavance* v. *Pickavance* (1) in 1900 says, "There seems to be no direct authority on this point"; and we have not been referred to any later case which the industry of counsel may have found.

Under these circumstances, notwithstanding the unfeigned respect I feel for Lord Gorell and the late Sir Francis Jeune, I should have found the greatest difficulty in giving to *Pickavance* v. *Pickavance* (1) the broad extension which, in my opinion, would be necessary to render it applicable here, even if there were not another vital circumstance which distinguishes it from the present case. There is, however, that vital difference. The complainant here was a common informer, and the prosecution was under a section which did not give any part of the penalty to the informer. The portion of the penalty awarded to him was not his by right, but was adjudged to him under the discretionary power given to the Justices by section 22 of the Petty Sessions Act, and section 13 of the Fines Act (2). Such an informer has no power, either by agreement or withdrawal of the summons, and without an adjudication on the merits, to bar

(1) [1901] P. 69.

(2) 14 & 15 Vict. c. 90.

BIBL. LONDIN. UNIV.

K. B. Div. 1911.

THE KING (McDONNELL) v. JUSTICES OF TYRONE.

Palles, C.B.

the right of the Crown; nor is he, either by reason of estoppel or otherwise, under any personal disability against prosecuting again after such a withdrawal.

The first point, therefore, taken by Mr. Murnaghan, in the course of his able and interesting argument, fails.

As to the second question—the applicability of the Small Penalties (Ireland), Act, 1873 (1), an ingenious point has been raised by Mr. Murnaghan. As far as I am aware, it has heretofore always been taken for granted that the Small Penalties Act was applicable to penalties under the Act of George 3 (2). I am not aware that the point has ever been raised, but of course Mr. Murnaghan was entitled to raise it; and it was in consequence of it having been raised, as we believe, for the first time that we took time to consider our judgment. The reason for its non-application, relied on by Mr. Murnaghan, is that if it applies, as the fine imposed exceeds £2, but does not exceed £5, the imprisonment which may be ordered in default of payment extends as far as two months—whereas, if the penalty were a larger one and exceeded £5, the Small Penalties Act, which is confined to convictions for penalties not exceeding £5, would not apply, and consequently the maximum imprisonment would be limited by the Act of George 3 (2) to one month. It is, undoubtedly, an anomaly; and it does credit to Mr. Murnaghan's subtlety to have brought it before us. But the question is, is it such an anomaly as would justify us in holding that the Act does not apply in a case like the present, where the penalty does not exceed £5?

I am of opinion that it is not. Of course we are familiar with the doctrine that a general affirmative Act does not, in general, repeal by implication a prior particular Act—a doctrine founded on the presumption that the Legislature, when passing the subsequent general Act, had not the prior Act in its contemplation. In the present case, however, the alteration of the Act of George 3 is not by implication—it is express.

Section 6 enacts: "This Act shall apply to penalties, including costs, recoverable in a summary manner, in pursuance of *any Act* of Parliament, whether passed before or after the commencement of this Act; and all provisions of any Act of Parliament

(1) 36 & 37 Vict. c. 82. (2) 27 Geo. 3, c. 35.

authorizing, in the case of non-payment of a penalty not exceeding £5, a longer term of imprisonment than is provided by this Act shall be repealed."

My judgment is based, not upon the 4th section alone, to which if it stood alone Mr. Murnaghan's argument might, perhaps, apply, but upon the two sections, the 4th and 6th, taken together. The penalty is one recoverable in a summary manner, in pursuance of an Act of Parliament passed before the commencement of the Act of 1873. It is within the very terms of the section which applies *particularly* to each previous Act the more general terms of the 4th section. Further, the Act is, plainly, *in pari materia* with the Petty Sessions Act, 1851, an Act which, by section 42, excepts from its provisions prosecutions under the Game Laws and the Inland Revenue Acts; whereas the exception in the Act of 1873 is only of penalties under the Inland Revenue Act. This, in my opinion, shows that the Legislature had before it the very question whether penalties under the Game Laws should be excluded from the particular words of section 6.

I must further observe that, in the present case, the absurdity —if it be an absurdity—or the anomaly does not arise upon the Act of 1873, but upon a comparison between the effect of that statute with matters wholly outside it, *viz.*, penalties exceeding £5, whereas the Act is limited to penalties not exceeding that sum. For these reasons, the rule relied on by Mr. Murnaghan is in my opinion not applicable. If the period of imprisonment imposed be deemed to be excessive, the Executive can be appealed to.

Mr. Murnaghan's last point is that section 19 of the Act of George 3 rendered it necessary that an information on oath should be made previously to issuing the summons. The words of the section are, "All offences . . . shall and may be inquired into and determined either by oath or confession." These words, in my opinion, refer to the *hearing* of the charge, not to the preferring of it. The summons was issued under the general common law jurisdiction of the Justices, and on the appearance of the defendant, the person charged, was inquired into and determined upon oath, which I hold to be a compliance with the section in question.

The cause shown must be allowed, but without costs.

K. B. Div. 1911.

THE KING (McDONNELL) *v.* JUSTICES OF TYRONE.

GIBSON, J.:—

The first point for decision is, should the word "withdrawn" in the orders be construed as equivalent to "dismissed"? The prosecution is under 27 Geo. 3, c. 35, which is outside the Petty Sessions Act, that statute only applying as regards forms of procedure, so that "dismissed" could not be read as "dismissed without prejudice." If the prosecution was dismissed, it is apparently conceded that such dismissal would deprive the Justices of jurisdiction to hear a renewal of the same complaint, and would not merely be available as a defence of *res judicata*; and I deal with the case on the assumption that *certiorari* is therefore applicable. A common informer being complainant, and the affidavits making no case of compromise, Mr. Murnaghan declined to argue that the cause of complaint could be treated as abandoned and settled by mutual consent *inter partes*. I need not, therefore, consider the question of possible compromise, or whether a game prosecution which does not involve a breach of the peace might not in certain circumstances be compromised, at least where there was no corrupt bargain. Putting compromise aside, I am of opinion that under the Petty Sessions Act "withdrawn" could not have a more binding effect than "dismissed without prejudice." The word only indicates that the case is struck out without hearing or adjudication. If the complaint is entered in the order-book, such note is necessary to explain why the adjudication column is not filled. I see nothing illegal or improper in such explanatory entry. The statute 27 Geo. 3, c. 35, contemplates a hearing followed by conviction or acquittal. "Withdrawn" cannot be an acquittal; it is not an adjudication at all; it only shows why the Court is not required to hear or determine; and it could not absolve the defendant from prosecution by another common informer. If a prosecutor declines to support his complaint, it may be dismissed; but such dismissal imports judicial action very different from an entry that the case is dropped and not proceeded with. Whether, where a complainant withdraws his complaint before the hearing begins and before evidence is given, the defendant assenting, the Justices can insist on adjudicating, is a question not

now before us. In civil complaints the right to discontinue the case is clear. In criminal complaints, where there has been no sworn evidence, and especially where there is no alleged breach of the peace, can the Justices compel the prosecutor to proceed and call witnesses? No case of this type has been brought to our attention. The cases cited in Mr. O'Connor's work, p. 50, are all distinguishable.

The argument as to the effect of "withdrawn" is mainly based on *Pickavance* v. *Pickavance* (1), where, in a considered judgment, Sir F. Jeune and Gorell Barnes, J., expressed the opinion that the term indicated that the cause of complaint was to be taken as extinguished. The case was under the Act of 1895, c. 39, and was an application by a wife for statutory relief founded on the husband's misconduct, not necessarily criminal. The proceeding was in its essence civil, not penal; no principle of public policy was involved, and compromise and contractual abandonment of the claim were competent; the Justices could not force the wife to go on. Having regard to the nature of the case, it might be argued that, where the case was withdrawn, it was intended on both sides that the cause of complaint was finally abandoned. I am unable, for the reasons already given, to agree with the reasoning of the eminent Judges in *Pickavance* v. *Pickavance* (1) as to the general effect of withdrawal.

The only other authority that I have been able to discover bearing on the effect of withdrawal is *Galliard* v. *Laxton* (2), where the point was raised on case stated. The decision was that the withdrawal of an information for rescue was no objection to proceeding on a charge of assault. The observations of the Judges during the argument seem adverse to defendant's argument before us.

The second point raised is, whether the Small Penalties Act, 1873, applies, and repeals, *pro tanto*, the Game Act, 27 Geo. 3, c. 35. If it does not, the conviction here would be invalid. The Act of 1873 is expressed in comprehensive terms, and appears to lay down a symmetrical and universal scale governing all penalties (reckoning therein costs) not exceeding £5. The arguments against

(1) [1901] P. 60.

(2) 2 B. & S. 363.

K. B. Div. 1911.

THE KING (McDONNELL) *v.* JUSTICES OF TYRONE.

Gibson, J.

applying it to 27 Geo. 3, c. 35, are these. First, it increases the period of imprisonment in case of penalties between £2 and £5. I do not attach much importance to this result by itself, as the Petty Sessions Act certainly imposes imprisonment in many cases where such punishment was before not warranted by special penal enactments. The main argument for excluding the Game Act is the admitted fact that for penalties with costs over £5 not only is distress an essential preliminary under that Act, but the maximum imprisonment is for one month. But anomalies exist in reference to the Petty Sessions Act, which is unquestionably amended by the Act of 1873. The former Act makes the penalty proper the standard. The statute of 1873 reckons costs in the penalty. A penalty of £4 and £1 costs would therefore entail imprisonment under the Act of 1873, but a penalty of £5 and costs might apparently only be enforceable by distress under the Act of 1851, sect. 22, as the provision as to imprisonment up to £5 has been repealed by the Statute Law Revision Act, 1893, c. 14.

The express exclusion of the Game Acts from the Petty Sessions Act would make me willing, if I could, to confine "summary conviction" in the later statute to convictions under the Summary Jurisdiction Acts as defined in the Interpretation Act; but such construction would be hardly compatible with section 6, and the express exception of revenue proceedings (with Game Acts excluded from the Petty Sessions Act) would seem to make it impossible to keep the Game Act out of the enactment of 1873. The consequences may be anomalous and unreasonable; possibly they may be the result of oversight; but the statute of 1873—which is in the nature of a particular code—is so expressed as to preclude the Court from restricting its operation.

BOYD, J., concurred.

Solicitor for the prosecutor: *Alex. E. Donnelly.*
Solicitors for John Elliott: *Elliott & Clark.*

J. G. T.

O'MARA, LIMITED, *v.* THOMAS M. DODD (1).

K. B. Div. 1911. Nov. 6.

Practice—Writ of summons—Breach within the jurisdiction of a contract made in the Isle of Man—Service out of the jurisdiction upon intended defendant in Isle of Man—Order XI, Rule 1 (*e*).

A trader, resident and carrying on business in the Isle of Man, ordered goods from a company carrying on business as bacon curers in Ireland, through the company's traveller. From transactions between the trader and the company, it appeared that upon such orders, goods were supplied by the company directly to the trader, and payment was made by the latter by cash order sent directly to the company in Ireland. Upon an application on behalf of the company for liberty to serve the trader out of the jurisdiction with a writ of summons for the price of goods sold to him through the company's traveller, liberty to serve the trader out of the jurisdiction was granted on the ground that, having regard to the course of dealing between the parties, the intended action was founded upon a breach within the jurisdiction of the contract made by the company's agent within the meaning of Order XI, Rule 1 (*e*).

MOTION *ex parte* for liberty to serve out of the jurisdiction upon Thomas M. Dodd, a British subject, resident in the Isle of Man, a writ of summons in an intended action by O'Mara, Limited, in which O'Mara, Limited, were intended plaintiffs and Thomas M. Dodd was the intended defendant, for the price of goods sold by the intended plaintiffs to the intended defendant.

The motion was grounded upon two affidavits of Arthur M'Neice, the Secretary of the intended plaintiffs, from which it appeared that on various dates in August and September, 1911, the intended plaintiffs received through their agent orders for goods from the intended defendant, and that in response to such orders goods amounting in value to the sum of £82 9*s.* were forwarded by the intended plaintiffs to the intended defendant, for which an account had several times been served upon the intended defendant, who had not paid any portion of the account

(1) Before KENNY, J.

K. B. Div. 1911. O'Mara v. Dodd.

due by him in respect of these orders. It also appeared from the above affidavits that the course of business between the intended plaintiffs and the intended defendant in respect of previous transactions between these parties had been that the intended defendant gave orders for goods to the agent of the intended plaintiffs, and that, upon such orders being forwarded to the factory of the intended plaintiffs at Limerick, they directly supplied goods to the intended defendant in accordance with the orders, and that, in payment for the goods so supplied, the intended defendant sent to Limerick, to the intended defendants directly, a cash order upon the Bank of Ireland at Limerick, no payments being made through the agent. The orders in relation to which it was intended to take the action were given to the agent of the intended plaintiffs in the Isle of Man, and were by him forwarded to Limerick to the intended plaintiffs; and the goods, the price of which the intended plaintiffs sought to recover, were sent directly by them in response to such orders directly from Limerick to the intended defendant in the Isle of Man.

Phelps, for the applicant, referred to *Robey* v. *Snaefell Mining Company* (1), and *Bell* v. *Antwerp, London, & Brazil Line* (2).

Kenny, J., being of opinion that the alleged breach of the contract was within the jurisdiction, made the order sought.

Solicitor for the plaintiff: *R. MacNamara.*

C. N. K.

(1) 20 Q. B. D. 152. (2) [1891] 1 Q. B. 103.

THE KING (JAMES HYNES) *v.* JUSTICES OF CLARE (1).

K. B. Div. 1911. Feb. 14.

Justices—Jurisdiction—Addressing of warrant to levy poor rate to High Sheriff—Certiorari.

On a complaint before them by a rate collector in respect of the non-payment of poor rate, Justices of the Peace made an order that the defendant to the complaint should pay the poor rate demanded and the costs of the complaint, and in default of such payment, that the rate and costs should be levied by distress and sale of the defendant's goods. The complainant applied that the warrant for distress should be directed to the district inspector of constabulary, but the Justices refusing the complainant's application, and notwithstanding that there was no nomination of or consent to act by the high sheriff, directed the warrant to the high sheriff for execution.

Held, that the Justices had no jurisdiction to direct the warrant to the high sheriff for execution, and that their order was bad and should be quashed.

MOTION to make absolute a conditional order that a writ of *certiorari* should issue, directed to the Justices of the county of Clare, to remove into the King's Bench Division for the purpose of being quashed, the order and adjudications made by the Justices at the Ennistymon Petty Sessions District of the county of Clare, and the warrant of the same date, on the hearing of a complaint designated "James Hynes, rate collector, complainant, Matthew M'Inerney, defendant," that the defendant did not pay at the complainant's house or office, or at all, the sum of £1 15*s.* 8*d.* for poor rates, made on the 25th April, 1910, due notice having been given, and that a writ of mandamus should issue directed to the said Justices to hear and determine the matter of the case designated as above, and issue the warrant of distress to the district inspector or head constable acting for the Ennistymon Petty Sessions, or such other person or persons (not being the complainant or the party interested) as the Justices issuing the same should see fit.

(1) Before LORD O'BRIEN, L.C.J., and BOYD, J.

K. B. Div. 1911. THE KING (HYNES) v. JUSTICES OF CLARE.

On the 25th November, 1910, a summons was issued by the prosecutor against M'Inerney, charging the non-payment of a sum of £1 15*s.* 8*d.* for poor rates made on April 25th, 1910, and requiring M'Inerney to appear on the hearing of the said charge before Justices at Ennistymon on the 31st November, 1910. This summons was duly served upon the defendant; and on the 30th November, 1910, the prosecutor appeared before the Justices at Ennistymon Petty Sessions Court to prosecute the complaint. The defendant did not appear, and was not represented. The Court, at the hearing, consisted of the Resident Magistrate, Mr. Joseph Carroll, and Doctor Alfred Hynes. The prosecutor was represented by a solicitor, Mr. J. J. Daly. Having duly proved the service of the summons, and that the rate was due, the Justices declared the prosecutor entitled to an order for the recovery of the £1 15*s.* 8*d.* with costs. Mr. Daly applied that the warrant for distress should, under section 25, sub-section (2), of the Petty Sessions (Ireland) Act, 1851, 14 & 15 Vict. c. 93, be directed to the district inspector or head constable of the constabulary for execution, and read to the Bench, from a copy certified by the Court reporter, part of the judgments of Lord O'Brien, Lord Chief Justice, and Mr. Justice Gibson, in *R.* (*Moore*) v. *Dublin Justices* (1). No person, other than the district inspector or head constable, was nominated by or on behalf of the prosecutor to execute the warrant. The magistrates refused the prosecutor's application as to the addressing of the warrant, and notwithstanding protest by Mr. Daly against this course, and that no evidence was given of consent upon the part of the High Sheriff to act in the execution, directed the warrant for execution to the High Sheriff for the county of Clare. The Chairman of the Bench (Mr. Carroll) gave as a reason for this course his opinion that the addressing of such warrant to the police was derogatory to them; and the head constable of the district, who was present at the hearing, notwithstanding protest from Mr. Daly as to his *locus standi* in the case, was permitted to argue and contend that the warrant should not be directed to the police. Mr. Daly refused to accept any responsibility for the execution of the warrant by the High Sheriff.

(1) [1910] 2 I. R. 681.

The conditional order was obtained on the 5th December, 1910, upon the following grounds, viz.:—

"1. That the order made and the warrant issued by the Justices on the 25th day of November, 1910, was (*sic*) made and issued respectively without and in excess of jurisdiction.

"2. That the said order and warrant are bad on their respective faces.

"3. That the said order was made and the said warrant was issued notwithstanding that the sheriff had not agreed to act in the matter, and that the prosecutor had declined to pay or be responsible for any payment to the sheriff as and for any expenses or fees claimed by him in reference to the execution of the said warrant.

"4. That the said warrant being directed to the High Sheriff and his assistants is not directed "to any person" or "persons" within the meaning of section 25, sub-section (2), of the Petty Sessions (Ireland) Act, 1851."

No affidavit showing cause was put in on behalf of the Justices.

Phelps, for the prosecutor:—

The warrant here was directed to the sheriff in spite of protest by the prosecutor. Gibson, J., in his judgment in *R.* (*Moore*) v. *Dublin Justices* (1), makes it clear that such a warrant cannot be directed to anyone except a member of the police force, unless there is consent by such person to act. The warrant cannot be directed to the sheriff, since he is not a consenting party; and if he refuses to execute it when directed, he is liable to a fine or to imprisonment. The sheriff is an officer of this Court; except under the provisions of section 7 of the Land Law (Ireland) Act, 1887 (2), where he can be made so at the landlord's request, the sheriff is not an officer of the Petty Sessions Court. The sheriff is made an officer of the County Court by statute; and a special statutory appointment and an oath are required to be made and

(1) [1910] 2 I. R. 681. (2) 50 & 51 Vict. c. 33.

K. B. Div. 1911.

THE KING (HYNES) v. JUSTICES OF CLARE.

taken to empower a sheriff to execute the King's writs. The defendants have illegally exercised their discretion as to the direction of this warrant. They cannot direct it to the High Sheriff, who is not volunteering to execute it as a private person, nor consenting to the direction of the warrant to him. The *Rathvilly Presentment Case* (1) is not in point here. The police could refuse to execute warrants such as are excepted by sect. 13 of the Constabulary (Ireland) Act, 1836 (2); but not this warrant: Petty Sessions (Ireland) Act, 1851, section 25, sub-section (2) (3). In the case of *R.* (*Gleeson*) v. *Tipperary Justices* (4), where a warrant to give possession in the case of a weekly tenant was directed to the High Sheriff of the county of Tipperary, the Court of King's Bench quashed the order so directing the warrant, and made absolute a conditional order to hear and determine the complaint, and to issue the warrant directed to the district inspector or other person. There must be someone to whom the warrant is directed, and it is submitted that where, as here, no other person is, nominated or consents to act, the Justices can only direct the warrant for execution to the district inspector or head constable of the district: Petty Sessions (Ireland) Act, 1851, section 25, sub-section (2) (3).

THE COURT, being of opinion that the order directing the warrant to the High Sheriff was made without, and in excess of, jurisdiction, made absolute the conditional order for *certiorari* and mandamus, and gave costs, measured at £9 9*s*., against the Justices who made that order.

Solicitor for the prosecutor: *John J. Doyle.*

C. N. K.

(1) 23 I. L. T. R. 33.
(2) 6 & 7 Wm. 4, c. 13.
(3) 14 & 15 Vict. c. 93.
(4) Unreported. (A short report of that case is given on the next page.)

THE KING (MARY ANNE GLEESON, ALICE GLEESON, AND CORNELIUS GLEESON) *v.* JUSTICES OF THE COUNTY OF TIPPERARY.

The 16th day of November, 1910, before LORD O'BRIEN, L.C.J., and GIBSON and BOYD, JJ.

MOTION to make absolute a conditional order that a writ of *certiorari* should issue directed to the Justices of county Tipperary for the purpose of removing into the King's Bench to be quashed the orders and adjudications of the said Justices made on the 8th day of October, 1910, and the warrant of that date, on a complaint by the prosecutors against one Matthew O'Brien, that, on determination by notice to quit of a weekly tenancy held from them, the defendant had refused to give possession of premises at Dublin Road, Nenagh, in the said county, and that a writ of mandamus should issue directed to the Justices to hear and determine the matter of the complaint, and, upon proof of the matters required to be proved by section 15, sub-section (3), of 14 & 15 Vict. c. 92, issue a warrant to the District Inspector of the district, or to any other person as special bailiff, authorizing him within such period as therein named, not less than seven, nor more than ten, clear days from the date of the warrant, to give possession of the said premises to the prosecutors or their known agent or receiver.

From the affidavits on which the motion for the conditional order was grounded, the following matters appeared:—On the 10th September, 1910, an order for possession of the premises at Dublin Road against O'Brien was obtained at the suit of the prosecutors by their solicitor, Mr. H. Shannon. Mr. Shannon supposed the warrant on this order to have been addressed to the police for execution, but, on discovering that this had not been done, and on learning by correspondence with the District Inspector that the police would oppose such direction, Mr. Shannon, after some considerable trouble, due to local feeling, obtained the service of a special bailiff, who resided 23 miles away, to execute the warrant. On the bailiff attempting to execute the warrant, a medical certificate that O'Brien's mother was ill on the premises and could not be with safety removed, was handed to the bailiff, who, thereupon, on Mr. Shannon's instructions, retired. A fresh summons was taken out by the prosecutors after a second notice to quit had been served upon O'Brien, and on the hearing of that summons on the 8th October, 1910, the Justices then assembled made an order that possession should be given by O'Brien to the prosecutors. Mr. Shannon, who appeared for the prosecutors, submitted that the warrant should be addressed to the police under 14 & 15 Vict. c. 92, and stated that it was

K. B. Div. 1911.

THE KING (HYNES) *v.* JUSTICES OF CLARE.

impossible for the prosecutors to obtain the services of any special bailiff, and referred the Bench to the case of *R.* (*Moore*) v. *The Dublin Justices* ([1910] 2 I. R. 681), and to an article on the execution of distress warrants at page 169 of the Irish Law Times, volume 44. Mr. Shannon further stated to the Justices that he could not, under the circumstances, nominate any person as special bailiff, and that if the warrant was not directed to the police for execution, he would be compelled to take steps by way of mandamus to compel the Justices to so direct the warrant. The District Inspector of constabulary opposed the direction of the warrant to the police as special bailiffs, and the Justices made an order directing the warrant for possession to the High Sheriff for execution, which order it was sought to impeach. Mr. Shannon suggested that steps should be taken to obtain the consent of the High Sheriff to act, but this suggestion was not adopted. The form of the warrant was as follows in respect of the operative portion thereof, viz. :—"This is to command you to whom this warrant is addressed, to execute the said order against the said person as follows:—To enter and give possession of said premises to complainants or their agents, in not less than seven, nor more than ten, clear days from the date of this warrant"; and the warrant was directed to the High Sheriff of the county of Tipperary for execution.

The grounds upon which the conditional order was obtained were as follows:—

"1. That the orders made, and the warrant issued by the said Justices on the 8th day of October, 1910, on the hearing of the said complaint were made without, and issued respectively without, and in excess of, jurisdiction.

"2. That the said order, and the said warrant are bad on their respective faces.

"3. That the sheriff of the county of Tipperary by whom the said order directs the said warrant to be executed, and to whom the said warrant was issued, is not, as such sheriff, a person to whom a warrant as a special bailiff can be issued under the 14 & 15 Vict. c. 92, s. 15, sub-section (3).

"4. That the said order was made, and the said warrant was issued, without the consent first had and obtained of the sheriff to act as a special bailiff thereunder.

"5. That the said order was made, and the said warrant was issued, notwithstanding that the said sheriff had not agreed to waive his remuneration for his services as such special bailiff as aforesaid, and notwithstanding that the prosecutors herein decline to pay, or be responsible for the payment of, any remuneration to the said sheriff for his services as such special bailiff as aforesaid.

"6. That the said order is bad for uncertainty, inasmuch as it directs the defendant to be ejected from the premises there mentioned in not less than seven, nor more than ten, clear days, but does not direct the date from which the said number of days shall run, and be computed.

"7. That the said warrant is bad inasmuch as it does not comply with the provisions of section 15 (3) of 14 & 15 Vict. c. 92, which require the person authorized in that behalf to give possession of the premises therein-mentioned to the landlord thereof, his known agent, or the receiver of the rents of his estate.

"8. That the said Justices who adjudicated on the hearing of the said complaint did not sign the said warrant."

An affidavit showing cause was filed by Mr. Thomas Ryan, one of the Justices; but it was directed to the grounds above mentioned, other than the objection to the direction of the warrant to the sheriff. The only ground that appears to have been argued before the Court on the motion to make the order absolute, was that in relation to the warrant being addressed to the sheriff for execution.

W. G. Gibson, for the prosecutor.

THE COURT, being of opinion that the order directing the warrant to the sheriff for execution was made without, and in excess of, jurisdiction, made absolute, with costs, the conditional order for *certiorari* and mandamus.

Solicitor for the prosecutors: *Henry Shannon.*

C. N. K.

K. B. Div. 1911.

Nov. 21, 22. Dec. 19.

THE KING (URBAN DISTRICT COUNCIL OF ATHY) *v.* THE JUSTICES OF COUNTY KILDARE (1).

THE KING (DONOGHUE AND OTHERS) *v* THE JUSTICES OF COUNTY CORK (1).

*Justices—Summary conviction—Defect cured—Power to amend—*40 *&* 41 *Vict. c.* 56, *s.* 76—*Petty Sessions order-book—Validity of present form—Petty Sessions (Ireland) Act,* 1851 (14 *&* 15 *Vict. c.* 93), *ss.* 21, 36—*Assault—Binding to good behaviour—Showing jurisdiction on face of order—Party aggrieved declining to prosecute—Recital in complaint sufficient—*24 *&* 25 *Vict. c.* 100, *s.* 42—25 *&* 26 *Vict. c.* 50, *s.* 9—*Sanitary authority—Water supply—Order of Justices imposing penalties for neglecting to supply water to house, not described as dwelling-house—Penalties imposed for neglect to supply water after seven days from request and payment of water-rate—No statement of tender of rate—Waterworks Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 17), *ss.* 44, 45.

M. issued a summons against the Athy Urban District Council, the sanitary authority of the district, complaining that she, being the occupier of a house in the district, the annual value of which did not exceed £10, and having paid to the district council the amount of water-rate for one quarter and requested them to lay down communication-pipes and other necessary works for the supplying of the said house with water for domestic use, the District Council neglected within seven days, and still neglected, to lay down such communication-pipes and other necessary works. An order was made by the Justices at Petty Sessions reciting the summons, finding the facts mentioned therein, and ordering the defendants to forfeit to the complainant the sums mentioned in the order. The Act in question provides for the supply of water, not to houses generally, but to dwelling-houses. It did not appear on the face of the order that the house in the present case was a dwelling-house. The defendants obtained a conditional order for a writ of *certiorari* to quash the order of the Justices on the ground (*inter alia*) that it was bad on its face, inasmuch as it did not state that the complainant was the occupier of a

(1) Before Lord O'Brien, L.C.J., Palles, C.B., and Gibson, Boyd, Kenny, and Wright, JJ. On account of the importance of the points raised in these cases they were reserved for argument before the present specially constituted Court.

dwelling-house. It appeared from affidavits filed in the matter that the house was, in fact, a dwelling-house, and that this was not disputed at the hearing before the Justices.

Held, the Court being satisfied that the house was in fact a dwelling-house, and that the omission of the word "dwelling" did not mislead or prejudice the defendants, or affect the merits of the case, that assuming the order to be defective by reason of the omission of the word "dwelling," the defect was cured by the provision in s. 76 of the 40 & 41 Vict. c. 56, that no conviction shall be held void or quashed by reason of any defect, omission, or variance in the summons, &c., upon which the same shall purport to have been made, provided same shall not have misled or prejudiced the defendant, or affected the merits of the case.

Per Palles, C.B. The subsequent clause in s. 76, giving power to amend a summons, charge, or information, does not apply to *certiorari* proceedings in the King's Bench Division.

Per Palles, C.B., and Gibson, J. The present form of Petty Sessions order-book approved of by the Lord Lieutenant in Council in purported exercise of the power given by s. 36 of the Petty Sessions (Ireland) Act, 1851, is not authorized by that section, and is, *per* Palles, C.B., inconsistent with the spirit and intention of the Act, *per* Gibson, J., inaccurate and misleading, in so far as it alters the heading "Cause of Complaint" in the form of order-book originally prescribed by the schedule to the Act, to "Cause of complaint as set forth in summons."

But held, per Curiam, that a conviction founded on a summons, which conviction set out on its face a good cause of complaint, was not invalidated merely by reason of the entry being in such present form.

When Justices convict summarily of an assault under 24 & 25 Vict. c. 100, s. 42, they may further order the defendant to find sureties for good behaviour.

Quære, per Lord O'Brien, L.C.J., and Gibson, J., when the Justices acquit of the assault, but direct the defendant to find sureties for good behaviour, must the order state on its face facts showing jurisdiction to give such direction?

In a conviction by Justices under 24 & 25 Vict. c. 100, s. 42, for assault, upon a summons issued by a person other than the party aggrieved, under the provisions of 25 & 26 Vict. c. 50, s. 9, the complaint as set out in the conviction contained an averment, following the form of the summons, which contained a similar averment, that the party assaulted had declined to prosecute.

Held, that the conviction was good, and that it was not necessary that the conviction should state that the Justices had found that the party aggrieved had declined to prosecute

Rex (*Johnston*) v. *Justices of Co. Armagh* (43 I. L. T. R. 112) not followed.

K. B. Div. 1911.

THE KING (U. D. C. ATHY) *v.* JUSTICES OF KILDARE.

THE KING (DONOGHUE) *v.* JUSTICES OF CO. CORK.

THE KING (URBAN DISTRICT COUNCIL OF ATHY) *v.* JUSTICES OF CO. KILDARE.

CERTIORARI.

Miss Maire Malone of Barrack Street, Athy, was complainant in a summons in which the prosecutors herein, the Athy Urban District Council, were defendants. The summons set out as follows:—"Whereas a complaint has been made to me that the said Maire Malone, being the occupier of a house, the annual value of which does not exceed £10, situate in Barrack Street, Athy, in said County of Kildare, and within the Urban District of Athy, and in which street-pipes have been laid down by you, and having paid to you the amount of water-rate payable in respect of such house for the period of one quarter, did on the 6th day of March, 1911, request you as the sanitary authority for the Urban District of Athy to lay down communication-pipes and other necessary works for the supply of said house with water for domestic and other purposes, and that you neglected within seven days, and still neglect, to lay down such communication-pipes and other necessary works. This is to command you," &c.

The summons came on for hearing before the Justices at Athy Petty Sessions, and an order was made by the Justices present. This order was set out in a certificate purporting to be made under the provisions of the Petty Sessions (Ireland) Act, 1851. The certificate was in the following form:—

"I certify that upon the hearing of a complaint that whereas a complaint has been been made to me" [The complaint as in the summons was then set out.] "An order was made on the 13th day of June, 1911, by the Justices present against the Athy Urban District Council to the following effect, viz., whereas a complaint has been made to me that" [here the complaint as in the summons was again set out], "and whereas it has been proved that the said Maire Malone was the occupier of said house, that the valuation of said house did not exceed £10, that a request was made by the said Maire Malone on the 6th day of March, 1911, to the said Athy Urban District Council to lay down communication-pipes

and other necessary works for the supply of said house with water for domestic purposes, and having duly paid to the said Athy Urban District Council the sum of 1*s.* 10½*d.*, proportion of water-rate payable in advance in respect of such house, and the said Athy Urban District Council neglected to lay down said communication-pipes and other necessary works within seven days from the date of said request, and whereas the summons in this matter was duly issued on the 17th day of May, 1911: It is hereby ordered that the said Athy Urban District Council do forfeit to the said Maire Malone the sum of £5, and a further sum of £128, being the sum of 40*s.* calculated for sixty-four days from the 14th March, 1911, to the 16th May, 1911, being the number of days during which such neglect continued after the expiration of seven days from the date of such request and payment of said sum of 1*s.* 10½*d.*, up to the date of issue of said summons, and for costs 3*s.* In default of payment of such sums of £5, and further sums of £128, and costs 3*s.*, forthwith, said sums to be levied by distress and sale of defendants' goods and chattels. The service of the said summons was duly proved."

The prosecutors herein obtained a conditional order for a writ of *certiorari* to quash the order made by the Justices on the grounds:—1. That the order was made without and in excess of jurisdiction. 2. That the order was bad upon its face, inasmuch as it did not state (*a*) that the said Maire Malone was the occupier of a dwelling-house; (*b*) that as regarded the sum of £5 ordered to be paid by the said order, that the Urban District Council of Athy neglected to lay down communication-pipes for seven days after the request to lay down the same, and after the payment or tender of the proportion of water-rate; (*c*) that as regards the sum of £128 ordered to be paid by the said order, that the neglect to lay down the said communication-pipes continued after seven days from the making of such request and tender. 3. That the amount awarded by the order was excessive. 4. That the Act 10 Vict. c. 17 did not apply to cases where the payment of the said water-rate had been made, but only where there had been a request and tender.

Miss Maire Malone filed an affidavit by way of cause against

K. B. Div. 1911.

THE KING (U. D. C. ATHY) *v.* JUSTICES OF KILDARE.

THE KING (DONOGHUE) *v.* JUSTICES OF CO. CORK.

making the conditional order absolute, in which she stated as follows:—

"I say that the evidence given on the hearing of the charge at Petty Sessions on the 13th June, 1911, was to the following effect. That I occupied the house and premises in Barrack Street, Athy, as tenant to Michael Malone for several years past, the valuation of the same being £5. That I resided on said premises for which I was rated, and from time to time kept lodgers therein. That from February, 1910, I had made several applications to the council for the water supply. I beg to refer to the said application and the replies thereto" (which were given in evidence at the hearing). "I was cross-examined to ascertain if I required the council merely to have the water-pipes brought into the kitchen, or if I required them brought through the house to supply both. I say that it was admitted on behalf of defendants at the hearing that due application had been made by me to have communication-pipes laid down, and other necessary works for the supply of my house with water, and that tender of the required amount had been duly made and refused, and that the council had neglected to comply with such request. The sole questions at issue in the case were: 1, that I was not in *bona fide* occupation of the house and premises; 2, that I intended to allow my father, whose house adjoined mine, to use the water when supplied to me. Against both these contentions the Bench ruled."

The present application was on behalf of the prosecutors to make the conditional order absolute, notwithstanding cause.

Ronan, K.C. (with him, *Henry, K.C.*, and *Swayne*), for the prosecutors:—

The important question is, assuming that the order of the Justices is bad on its face, has the King's Bench Division power in *certiorari* proceedings to amend it? We contend that there is no such power. In England power was expressly given to the Court of Quarter Sessions on appeal, and to the Queen's Bench on *certiorari*, to amend a conviction in the circumstances therein mentioned: 12 & 13 Vict. c. 45, s. 7. The legislative provisions in Ireland are different. By 27 & 28 Vict. c. 99, s. 49, power

was given to amend a conviction, but confined to Quarter Sessions on appeal. By 40 & 41 Vict. c. 56, s. 76, power was given to the Justices, at the original hearing, or any Court of Appeal, or Superior Court before whom the decision of the Justices should afterwards come, to amend the *summons, charge, or information* for the purpose of making the conviction conformable with the same, or of raising the real question at issue and deciding the case as justice shall require. This, however, gives no power to amend the conviction : see *The King* (*M'Ardle*) v. *Justices of Louth* (1). It may be argued that, by reason of the form of order-book now in use at Petty Sessions, an amendment of the summons operates to amend the conviction. We submit that this form of order-book, purporting to have been approved of by the Lord Lieutenant with the advice and consent of the Privy Council, pursuant to sect. 36 of the Petty Sessions Act, is unauthorized by that section, and is *ultra vires*, inasmuch as it alters the heading "Cause of complaint" in the form of order-book (D) prescribed by the Act, to "Cause of complaint as set forth in summons." The scheme of the Petty Sessions Act was that the conviction should be self contained, showing on its face a good cause of complaint—without reference to the summons or any antecedent document. The summons is merely a process to compel appearance. It is only to state shortly the cause of complaint (s. 11), and no objection can be taken for any alleged defect in it (s. 39). The power given by section 36 was not to alter, but to *extend*, the form of order-book prescribed by the Act, so far as to adapt it to any like proceedings either new or not provided for therein. The addition of the words "as set forth in summons," so far from extending the original form, actually restricts it, since it excludes cases in which there has been no summons. No doubt, in the year 1878, by 41 & 42 Vict. c. 69, s. 11, power was given to the Lord Lieutenant in council to *alter* the form of the order-book ; but the form now in use had been prescribed long before the passing of that Act. We have not been able to ascertain when the present form of order-book was approved of; but it has been in existence at all events since the year 1869, as it is to be found in an edition published in that year of Humphrey's Justice of the Peace. There is no trace

(1) [1904] 2 I. R. 64.

K. B. Div. 1911.

THE KING (U. D. C. ATHY) *v.* JUSTICES OF KILDARE.

THE KING (DONOGHUE) *v.* JUSTICES OF CO. CORK.

of any order dealing with the matter having been made since the passing of 41 & 42 Vict. c. 69. The result therefore is that a conviction in the present form is bad. It would not have been good at Common Law, and it is not made valid by section 36 of the Petty Sessions Act, since the order-book is not in the form prescribed by that section, nor authorized by the power thereby given to extend such form.

Further, the expression "Superior Court" in section 76 of 40 & 41 Vict. c. 56 does not include the King's Bench Division exercising its jurisdiction in *certiorari*. The power of amending the summons given to the Superior Court by that section is confined to amending upon a case stated, as was done in *Keenan* v. *Costelloe* (1). On *certiorari* the Court cannot look at the evidence before the Justices: *The King* (*Martin*) v. *Mahony* (2). How then can it determine what was the real question at issue, and decide it as justice shall require?

Even assuming that under 40 & 41 Vict. c. 56, sect. 76, the King's Bench Division has power on *certiorari* to amend the summons, such amendment would not make the conviction good. It would be necessary also to amend the complaint as set out in the order-book, that is to say, to amend the *conviction*, and this there is no power to do.

As to the earlier part of the 76th section of 40 & 41 Vict. c. 56, which provides that no conviction or order shall be held void or quashed by reason of any defect, omission, or variance in the summons, charge, or information upon which the same shall purport to have been made, provided it shall not have prejudiced the defendant, or have affected the merits of the case, this merely means that where there is a valid conviction, showing a good cause of complaint on its face, you cannot go behind it and hold it bad by reason of a defect in the summons or information.

In the present case the order is bad on its face, inasmuch as it does not state that the house is a dwelling-house. The person entitled under sect. 44 of the Waterworks Clauses Act, 1847, to a supply of water is the owner or occupier of a *dwelling-house*. The

(1) 44 I. L. T. R. 218. (2) [1910] 2 I. R. 695.

word "house" does not necessarily mean a dwelling-house: *Daniel* v. *Coulsting* (1). By sect. 2 of the Public Health (Ireland) Act, 1878 (which incorporates the Act of 1847), the word "house" includes schools and factories and other buildings in which persons are employed, showing that house and dwelling-house are not synonymous terms. The statement in the order that the supply was required for domestic purposes is not sufficient to show that the house was a dwelling-house. Water used to wash a carriage in a coach-house would be used for a domestic purpose, although the coach-house might be in a different locality from the dwelling-house of the owner of the carriage.

The order is also bad in so far as it imposes the penalty of 40*s.* for every day during which the neglect to lay down communication-pipes continued after the expiration of seven days from the date of the request and *payment*. By sect. 45 of the Act of 1847 this penalty is incurred only where the neglect continues after the expiration of seven days from the date of the request and *tender*. This is a penal clause and must be construed strictly.

James O'Connor, *K.C.* (with him *John O'Byrne*), for Miss Maire Malone:—

Assuming the conviction to be bad by reason of the omission of the word "dwelling" before "house," this omission was a mere slip. It was not disputed on the hearing before the Justices that the house was a dwelling-house. The case therefore comes under sect. 76 of 40 & 41 Vict. c. 56, and the King's Bench Division has power to amend the summons by adding the word "dwelling" before "house." Such amendment will, having regard to the present form of order-book, automatically amend the conviction. If this result would not follow, section 76 would have no practical operation. What would be the use of amending the summons if the conviction was to remain bad? The present form of order-book was in use when the Act of 40 & 41 Vict. c. 56 was passed, and it must be assumed to have been passed with knowledge of such form. There is nothing in the section to show that the power of amendment given to the Superior Court is not to apply to proceedings in *certiorari*.

(1) 8 Scott, N. R. 949.

K. B. Div. 1911.

THE KING (U. D. C. AYHY) *v.* JUSTICES OF KILDARE.

THE KING (DONOGHUE) *v.* JUSTICES OF CO. CORK.

As to the argument that the alteration of the order-book by the addition of the words "as set forth in the summons" makes a conviction following such form void, we submit that the added words are mere surplusage. If the argument were to prevail, every conviction at Petty Sessions since the present form came into use would have been bad. [He referred to *The King* (*Burke*) v. *Justices of County Cork* (1).]

We further, however, contend that the conviction is good as it stands. The statement that the water was required for domestic purposes is sufficient to show that the house was a dwelling-house. A house may be a dwelling-house although no person sleeps there: *Cooke* v. *New River Co.* (2); *South-West Suburban Water Co.* v. *St. Marylebone Union* (3).

As to the point that the conviction should have referred to request and *tender*, and not request and payment, we submit that payment necessarily includes tender.

Swayne, in reply, referred to *Colley's Patents* (*Limited*) v. *Metropolitan Water Board* (4). *Cur. adv. vult.*

THE KING (DONOGHUE) AND OTHERS *v.* JUSTICES OF COUNTY CORK.

CERTIORARI.

The prosecutors herein, John Donoghue, James Donoghue, Patrick Sheehy, and Edward O'Leary, together with one John Cronin, were charged on summons with having unlawfully assaulted and beaten one Edmond Goold. The summons, so far as material, was as follows:—

PETTY SESSIONS DISTRICT OF MACROOM, COUNTY OF CORK.

The King, at the prosecution of C. A. Walsh, D. I. R. I. Constabulary of Macroom, *Complainant.*

Edward O'Leary, John Donoghue, James Donoghue, Patrick Sheehy, and John Cronin, *Defendants.*

Whereas a complaint has been made to me that you, at Macroom, in the said district and county, on the 16th day of October, 1911, did unlawfully assault and beat one Edmond Goold, and the said Edmond Goold having declined to prosecute,

This is to command you, etc.

(1) [1905] 2 I. R. 309.
(2) 38 Ch. D. 56, at p. 66.
(3) [1904] 2 K. B. 174, at p. 180.
(4) 28 Times, L. R. 48.

The case was heard at Macroom Petty Sessions on the 28th October, 1911, and an order was made by the Justices present, and entered in the order-book. The entry in the sixth column of the order-book, headed "Cause of Complaint as set forth in Summons," was as follows:—"That on the 16th day of October, 1911, at Macroom, Co. Cork, the defendants did unlawfully assault and beat one Edmond Goold, and the said Edmond Goold having declined to prosecute." The entry in the seventh column, headed "Particulars of Order or Dismissal," was as follows:—"The charge of assault against Edward O'Leary is dismissed without prejudice, and it is ordered that he enter into recognizance in £10, with two sureties in £5 each, to be of good behaviour towards all His Majesty's subjects for twelve months. The charge against John Cronin is dismissed on the merits. The defendants John Donoghue, James Donohue, and Patrick Sheehy are severally convicted of the said offence, and are ordered to be imprisoned forthwith, and kept to hard labour, in Cork gaol, for one calendar month. At the expiration of said imprisonment the three said defendants are severally ordered to enter into recognizance forthwith in £10 each, with two sureties in £5 each, to be of good behaviour towards all His Majesty's subjects for twelve months. In default of entering into said recognizance to be further imprisoned for one calendar month, unless they shall severally enter sooner into said recognizances."

The present application was by the prosecutors herein on notice, by special leave of the Court, for a conditional order for a writ of *certiorari* to quash the convictions and orders of the justices, whereby the said John Donoghue, James Donoghue, and Patrick Sheehy were convicted, and the said Edward O'Leary was ordered to enter into recognizance to be of good behaviour, on the grounds, so far as material for the purposes of the present report, that, (*a*) they were made without and in excess of jurisdiction; (*b*) that they were bad upon their face and bad in law; (*c*) that the conviction did not show that the person aggrieved had declined or refused to prefer a complaint; (*d*) that there was no person aggrieved within the meaning of 24 & 25 Vict. c. 100, s. 42, and 25 & 26 Vict. c. 50, s. 9; (*e*) that the Justices had no jurisdiction to hear the complaint, as the said complaint was not made

K. B. Div. 1911.

THE KING (U. D. C. ATHY) v. JUSTICES OF KILDARE.

THE KING (DONOGHUE) v. JUSTICES OF CO. CORK.

by or on behalf of the party aggrieved; (*f*) that the prosecutor was not a person who could prefer a complaint on behalf of the party aggrieved; (*g*) that the prosecutor had no authority to prefer the complaint; (*h*) that the order of conviction did not state that the Justices had found that the party aggrieved had declined or refused to prosecute; (*i*) that the words in the summons, viz., "and the said Edmond Goold having declined to prosecute," are insufficient within the meaning of the statutory provision in that behalf to give the Justices jurisdiction to hear the complaint.

Ronan, K.C. (with him *Lehane*), for the prosecutors :—

I desire to be taken as repeating the argument advanced in the last case as showing the invalidity of convictions entered according to the present form.

The order in the present case is bad, inasmuch as it directs the prosecutor herein to enter into recognizances for good behaviour. The charge was under sect. 42 of 24 & 25 Vict. c. 100, which gives no power to bind to good behaviour. An express power to bind to good behaviour is given by section 43, in cases of assault coming within that section, thus showing that it was intended that there should be no such power in cases under section 42. This was so held in *Godsen* v. *Dartford Justices* (1), though I admit that that case, being only a decision of Quarter Sessions, cannot be cited as an authority in this Court.

The order is also bad on another ground. The prosecution was not by the party aggrieved, but by the District Inspector of constabulary, purporting to act under the power given by 25 & 26 Vict. c. 50, sect. 9, and the conviction does not state that the Justices have found that the party aggrieved had declined to prosecute. The mere recital of this in the summons is not sufficient: *Rex* (*Johnston*) v. *Justices of County Armagh* (2). [He also referred to *The King* (*Prendergast*) v. *Justices of Waterford* (3).]

The *Solicitor-General* (*Ignatius O'Brien, K.C.*) (with him *H. MacDermot*), for the Crown :—

The present form of order-book is good. Section 36 of the

(1) 62 J. P. 104.
(2) 43 I. L. T. R. 112.
(3) 4 N. I. J. R. 196.

Petty Sessions Act provides that the form in the schedule to the Act, or forms to the like effect, shall be deemed good and sufficient in law, and that no departure from any of the said first-mentioned forms or use of any other words than those indicated in such forms, shall vitiate the proceeding if the form used be otherwise sufficient in substance and effect. The words "as set forth in the summons," in column 6 of the order-book, are mere surplusage, and cannot vitiate the conviction. In a case in which there is no summons, these words could be struck out. Having regard to the above-mentioned provisions of section 36, the present form of order would be good, even though it had not been approved of by the Lord Lieutenant in Council. If the argument on the other side is right, every conviction made at Petty Sessions during the last forty years and upwards, is bad.

The order directing the prosecutors herein to enter into recognizances to be of good behaviour is good. An order binding to good behaviour is not punishment: *Ex parte Harken* (1). It is not necessary that express power should be given by the section. The Justices have such power apart from statutory provision, and may exercise it even where they acquit the defendant of the offence charged. As to the case of *Godsen* v. *Dartford Justices* (2), not merely is it only a decision of Quarter Sessions, but the argument which prevailed went on the ground, adopting an article in 56 J.P. 787, that *Ex parte Harken* was wrongly decided.

The recital in the summons, incorporated in the conviction, that the party aggrieved has declined to prosecute is sufficient; and it is not necessary that it should be set out that the magistrates had found that he had so declined. The summons here is admittedly good; and if the summons is good, a conviction following and based on it is good: *The King* (*Sheahan*) v. *Justices of Cork* (3), *per* Gibson, J. The case of *Rex.* (*Johnston*) v. *Justices of County Armagh* (4) cannot be supported.

Lehane, in reply, referred to *In re Rice* (5); *Nicholson* v. *Booth* (6).

(1) 24 L. R. Ir. 427.
(2) 62 J. P. 104.
(3) [1907] 2 I. R. 1, at p. 12.
(4) 43 I. L. T. R. 112.
(5) I. R. 7 C. L. 74.
(6) 57 L. J. (M. C.), 43.

K. B. Div. 1911.

THE KING (U. D. C. ATHY) *v.* JUSTICES OF KILDARE.

Dec. 19.

THE KING (U. D. C. ATHY) *v.* JUSTICES OF KILDARE.

LORD O'BRIEN, L.C.J. :—

The controversy we have to determine involves a very important question as to the true construction of the 76th section of 41 & 42 Vict. c. 56. The facts which gave rise to the controversy were shortly as follows :—

A Miss Malone, who lives in the town of Athy, sued, by summary process before the magistrates, the Urban District Council of Athy, for penalties for not making communication-pipes to supply water to her house, which was, in point of fact, a dwelling-house.

The summons upon which the proceedings were founded used the word "house" and not the word "dwelling-house," and it is now strenuously argued that the order that was made is bad, because of the omission of the word "dwelling" before the word "house"; because the word "house" is used instead of the word "dwelling-house"; that in fact the alleged defect or omission in the summons vitiates the whole proceedings. This is all supremely technical. The "house" was in point of fact a "dwelling-house," with all the attributes of a "dwelling-house" within the meaning of the relevant statute, the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17, s. 44). It was situate in a town; a supply of water was wanted for domestic purposes. The word "house" in its primary signification, according to the Oxford Dictionary, means "dwelling-house." The point now put forward was not taken before the magistrates, who would have had no difficulty in amending; and in the form prescribed by the Local Government Board the word "house" and not "dwelling-house" is used. The defendants' contention before the magistrates, which was conversant with altogether different matters, entirely failed. I do not decide that the word "house" is insufficient; but I shall assume, for the purposes of the controversy before us, that it is insufficient: that the word ought to be "dwelling-house." How then does this mistake—if mistake it was—invalidate the order that was made? The order purports to be made upon the summons; and the defect or omission complained of is to be

found in the summons. Now, if what is arraigned in the summons does not under the circumstances of the particular case vitiate it, if it is but a mere negligible matter, then the record stands free from all impeachment. What does the 76th section of 41 & 42 Vict. c. 56 provide? It runs thus:—

"No conviction or order made by any Justice or Justices shall be held void, or quashed, by reason of any defect, omission, or variance in the summons, charge, or information upon which the order shall purport to be made, provided such defect, omission, or variance shall not have misled or prejudiced the defendant, or have affected the merits of the case."

It is absolutely plain that the defect or omission which exists here, viz., the use of the word "house" instead of the word "dwelling-house" did not mislead or prejudice anyone, or in any way affect the merits of the case. It was not pretended that it did so; no such contention was put forward in the course of the argument; the affidavits, at which we can look in a case like this which expressly contemplates investigation of the merits, make this plain. The decision in *The King* (*Martin*) v. *Mahony* (1) is in no way trenched upon. Well, this being so, how stands the case? What is the result? That the conviction or order is not to be held void, or to be quashed. The mistake that has been made is innocuous; is to be regarded as a mere nullity, and without significance. There is no misleading; the defendant is in no way prejudiced; the merits of the case are in no way affected; and, accordingly, the proceeding stands free of impeachment. Thus, in my opinion, the opening lines of the section I have read render the proceedings immune from objection, and enable substantial justice to prevail over sheer technicality. This, indeed, is a desirable result, and I rejoice to find myself a party to a decision so salutary. Mr. O'Connor presented a somewhat different view of the 76th section of the Act. He submitted that in every case it worked by amendment; that the summons or charge should be amended by changing the word "house" into the word "dwelling-house," and that thereupon the order would become automatically right. I neither adopt nor reject this view. The

(1) [1910] 2 I. R. 695.

K. B. Div. 1911.

THE KING (U. D. C. ATHY) *v.* JUSTICES OF KILDARE.

Lord O'Brien, L.C.J.

result in either case would be the same; but I prefer to rest my decision on the opening lines of the 76th section, and the effect I attach to them.

Another point was argued which, strange to say, I do not find taken in the conditional order—a very sweeping objection indeed. It is said, so far as I understand the objection, that the order-book was wrong in form; that the heading "Cause of complaint as set forth in summons," is not right; but this form has been in use for the last fifty years, and has been recognized during that period by the settled practice of the Court. Indeed, I think the words "cause of complaint as set forth in summons" may be read as cause of complaint as, for example, in summons. Moreover, the 36th section of the Petty Sessions Act expressly gets rid of all objections on the ground of non-compliance with mere forms. I should be slow, indeed, to give effect to an objection calculated to lead to such ineffable confusion, even if properly taken in the conditional order.

PALLES, C.B.:—

This application, which was originally heard before Gibson and Boyd, JJ., and myself, was for a writ of *certiorari* to bring up and quash a conviction of the Athy Urban District Council, purporting to have been made under the Waterworks Clauses Act, 1847 (10 Vict. c. 17), sections 44 and 45 (which admittedly have been applied to, and are now in force in, the town of Athy, under the provisions of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52)), for penalties amounting to £133, for neglecting to lay down communication-pipes and other necessary works for the supply of the respondent's house with water for domestic purposes.

The sections of the Act of 1847 which I have mentioned refer not to houses generally, but to *dwelling*-houses only; and it does not appear upon the conviction that the respondent's house is a dwelling-house, unless it can be inferred to be of that character from the circumstance that the supply of water to it was required "for domestic purposes." It has, however, been settled by many cases in England, the most recent of which is a decision of the

House of Lords, pronounced a few weeks since (1), that houses other than dwelling-houses, as, for instance, factories and schools, may be entitled under the corresponding Public Health Acts in England, to a supply of water for domestic purposes. Consequently it is impossible to infer, as a matter of law, from the domestic character of the required supply, that the house to which it is required is a dwelling-house. Upon this ground I and, I believe, my colleagues, Gibson and Boyd, JJ., were of opinion that there was a defect in the charge upon which the conviction was had, which would be fatal, unless it were cured by the express declaration in the commencement of section 76 of 40 & 41 Vict. c. 56, or unless the Court had power to amend the conviction under that section.

In reference to the application of that section, we were satisfied by the uncontradicted statements in the respondent's affidavit that the house was, in fact, a dwelling-house, and that the omission from the charge in the summons of the word "dwelling" did not mislead or prejudice the defendants, or affect the merits of the case. It was thus clear, in our opinion, that the decision should rest upon the construction of this section

This section, although enacted upwards of thirty years since, had not been made the subject of much consideration. Indeed, it was open to the prosecutor to contend that the course of decision, or at least the course of practice under it, had somewhat narrowed its operation; and we, therefore, thought it right that the case should be re-argued before the full Court—a Court which would not be bound by any previous decision which, in its opinion, unduly narrowed the scope of this beneficial enactment. Accordingly, the case has been very fully and learnedly discussed; and we have now to give our judgment as to its bearing upon the case in hand.

I have to observe, in the first instance, that although the section consists of but one sentence, it contains two provisions, each of which is grammatically distinct from the other. The

(1) *Colley's Patents (Limited)* v. *Metropolitan Water Board* (since reported [1912] A. C. 24).

K. B. Div. 1911.

THE KING (U. D. C. ATHY) *v.* JUSTICES OF KILDARE.

Palles, C.B.

first part of it, which I shall style the first clause, is in these words :—

"No conviction . . . made by any Justice . . . shall be held void, or shall be quashed by reason of any defect, omission, or variance in the summons, charge, or information upon which the same shall purport to have been made, provided that it shall not have misled or prejudiced the defendant, or have affected the merits of the case."

So far, the enactment is prohibitive on the Court; and had the section contained no more, the judicial action of the Court in determining whether the section was applicable to the present conviction would necessarily have been limited to the consideration of the subject-matter of its concluding proviso. In that event, if the Court were of opinion—as I have already said I am of opinion—that the omission of the word "dwelling" has not misled or prejudiced the defendant, and has not affected the *merits* of the case, it would have no jurisdiction to decline to give effect to the enactment, but would be coerced to refuse to quash the conviction.

The section, however, does not stop with what I have read. It proceeds in the following words, which I hereafter refer to as the 2nd clause of the section :—

"*And* the Justice . . . at the *original* hearing, or any Court of Appeal or Superior Court before whom the decision of any such Justice . . . shall afterwards come may, upon such terms as shall appear just, make any amendment in any summons, charge, or information which shall appear to be requisite for the purpose of making the conviction . . . conformable with the same, or of *raising* the real question at issue and *deciding* the case as justice shall require."

The greater part of the argument has been directed to the question whether this Court, when acting on an application such as the present, *i.e.*, in its prerogative jurisdiction, is a "Superior Court, before whom the decision of the Justice has come," within the meaning of the section; and, if so, whether the amendment of the summons or charge, which, as distinguished from amendment of the conviction is alone authorized, would,

by reason of the Petty Sessions Act, 1851, automatically, as it is said, operate to amend the conviction.

But, before we come to these questions on clause 2, we must give due effect to clause 1 ; and unless the effect of the two clauses being joined by the copulative "and" is to render them inter-dependent, and restrict the operation of clause 1 to cases in which there has been, or might have been, an amendment under clause 2, then clause 1 must be absolutely independent of any amendment or power to amend, and its effect must be to support the conviction, whether the Court acting in its prerogative jurisdiction is or is not within the second clause. I entertain the strongest possible opinion that the use of this copulative "and" found in the context in which it is here is wholly inadequate to work such a construction ; and Mr. Justice Kenny who is engaged judicially elsewhere to-day, has authorized me to say that, on this ground, he agrees with me in holding that the conviction cannot be quashed.

As to this suggested restriction, I desire to observe :

(1) That the subject-matters of the two clauses are different. That of the first is "convictions" and "orders" ; that of the second, matters preliminary to convictions or orders, viz., summonses, charges, and informations."

(2) That the nature of the action of the Court under each clause, is different. Under the first it is mandatory, under the second it is discretionary. Under the first it is purely negative. No new power is given. The jurisdiction is confined to determining whether the conditions mentioned in the proviso have been satisfied. If this be determined in the affirmative, there can be no further judicial action. The enactment itself effects the result "the conviction shall not be quashed," and if the determination be in the negative, the section does not apply. On the other hand, the only effect of clause 2 is to empower action in the shape of amendment.

(3) The scope of clause 2 is far more extensive than that of clause 1. That of the first is "any defect, omission, or variance in the summons, charge, or information" ; that of the second is not limited.

K. B. Div. 1911.

THE KING (U. D. C. ATHY) v. JUSTICES OF KILDARE.

Palles, C.B.

(4) Lastly, I have to add that any amendment made under the 2nd clause in aid of, or by reason of, action under the first clause, must necessarily be ineffective and useless, because, as it is out of the question that the Court, on *certiorari*, could "decide" any question which it might deem "the real question," other than that or distinguished from the question in fact tried or determined, such amendment, if made on application for *certiorari*, should necessarily be restricted to the first class authorized, viz., such as was requisite to make the charge conformable to the conviction; and the variance between such charge and conviction is the matter which the first clause declares shall not be held to be reason for quashing.

I pass, now, altogether from clause 1, which I hold to be entirely independent of, and unrestricted by, clause 2; and I come to the questions raised on the latter clause. This second clause contemplates that, after the amendment, there may be a *decision* of the charge, whether such charge be contained in a summons, or in an information, or otherwise. Such a decision, if not made by "the Justices at the original hearing," must be by a tribunal with appellate powers, competent to determine the charge The class of tribunals defined by the section as authorized to amend, other than "the Justices at the original hearing," are any Court of Appeal or superior Court before whom the decision of any such Justice shall come." To restrict this class, as we must, to tribunals having jurisdiction to determine the charge, we must hold that "superior Court" in the description means "Superior Court on hearing a case stated," and does not include the King's Bench Division in the exercise of its prerogative jurisdiction—a Court whose jurisdiction is not to hear the charge, but to determine whether the inferior tribunal has or has not exceeded its jurisdiction in its determination of the charge.

This construction, indeed, would, in my opinion, be the correct one, without the assisting context to which, up to the present, I have referred, because a power of amendment conferred upon "any Superior Court before whom the decision shall afterwards come" would *prima facie*, appear to refer to *any* Superior Court acting in a jurisdiction common to all, and in which, after amendment, they would have jurisdiction to affirm, alter, or reverse

the decision, and not to include one particular Superior Court acting in a jurisdiction peculiar to itself.

In result, then, I am of opinion that this Court, acting in its prerogative jurisdiction in this proceeding for a *certiorari*, is not "a Superior Court before whom the decision of the Justices" comes, within the meaning of the 76th section of the Act of 1877; and that, consequently, we have not jurisdiction to amend the summons. Having arrived at this conclusion, it is unnecessary for me to discuss at length the further question (which does not now arise), viz., whether, if we had power to amend the summons, such amendment would automatically act as an amendment of the conviction. I may, however, say that at an early stage of the argument I arrived at the clear opinion, which I have ever since retained, that such automatic result could not ensue.

Upon the whole, then, I am of opinion that the cause shown against the conditional order should be allowed, with costs.

GIBSON, J.:—

There are three questions for decision, all of them important, and two new: (1) Is the conviction, apart from section 76 of the Act of 1877, c. 56, bad on its face by reason of the omission of the word "dwelling"? (2) If such omission would, apart from section 76, invalidate the conviction, is the defect cured without amendment, or is it curable by amendment, by virtue of that section? (3) Is the conviction, though otherwise good on its face, or cured or curable under section 76, intrinsically invalid by reason of the order book now in use departing from the form prescribed by the Petty Sessions Act, without statutory authority? This last point, which properly arises in the next case (the Cork Justices), was argued in both cases, and as the discussion was addressed to the Act of 1877, in relation to the Petty Sessions Act, I consider it here.

1. The prosecution was intended to be under 10 & 11 Vict. c. 17, section 44, but it substitutes "house" for "dwelling-house." The complaint must, like an indictment, be construed as it stands, without regard to evidence or the facts proved. A house not used as a dwelling may require for domestic purposes:

K. B. Div. 1911.

THE KING (U. D. C. ATHY) v. JUSTICES OF KILDARE.

Gibson, J.

The Metropolitan Water Board v. *Colley's Patents, Limited* (1), since affirmed by the House of Lords. The question is not the same as if we were construing "house" in a statute, where, in a particular context, the term might be interpreted to mean dwelling. Here "dwelling" is a necessary part of the description of the statutory offence. The statutory language must be followed unless words of equivalent meaning are substituted: *Turner's Case* (2), *R.* v. *Ryan* (3), *R.* v. *Davy* (4), and the cases collected in Mr. O'Connor's valuable work, pp. 85–7.

2. Section 76 up to this has been allowed to remain a dead letter. If ever there was a case demanding remedy, the present is such case. The house was unquestionably a dwelling-house; the true statutory offence was established; the omission was a mere slip, not affecting the merits or the decision. Had the objection been made at the hearing, the omission would have been at once corrected; and this Court ought not, if it can avoid it, to give effect on *certiorari* to formal objections which, if made below or on appeal or case stated would have had no weight; *R.* v. *Tabrum* (5), *Bannister* v. *Sullivan* (6).

It is desirable to recall the state of law in England and in Ireland respectively when the amendment contemplated by section 76 was introduced.

In England, the conviction under section 14 of Jervis's Act was a separate substantive document, not referring to the complaint; it was (subject to certain limitations) amendable by the Justices: *Charter* v. *Greame* (7), *Ex parte Johnson* (8). Slips in the conviction could be corrected under 12 & 13 Vict. c. 45, section 7, by Quarter Sessions on appeal or by the Queen's Bench on *certiorari*: *R.* v. *Higham* (9), *R.* v. *Tabrum* (5), but the Queen's Bench declined to correct where the defect was one of substance: *R.* v. *Padbury* (10), *R.* v. *Tomlinson* (11). Under the Case Stated Act there was power to amend the determination. There was also

(1) [1911] 2 K. B. 38.
(2) 1 Moody C. C. 239.
(3) 2 Moody C. C. 15.
(4) 1 Cox C. C. 60.
(5) 71 J. P. 325.
(6) 20 Cox, 685.
(7) 13 Q. B. 216.
(8) 3 B. & S., p. 952.
(9) 7 E. & B. 557.
(10) 5 Q. B. D. 128.
(11) L. R. 8 Q. B. 12.

wide jurisdiction to amend the complaint given to the Justices before the adjudication. Though there was no express power to amend the complaint after conviction, it was held that, having regard to section 1 of Jervis's Act (corresponding with section 39 of our Petty Sessions Act), the Court could on case stated direct a conviction, notwithstanding that the complaint was in substance defective: *Bannister* v. *Sullivan* (1). Our Irish code was widely different. The record for criminal and civil cases alike was the order-book signed by a Justice under section 21 of the Petty Sessions Act. The conviction column is based on the recorded complaint which it does not repeat; the conviction is not, as in England, self-sufficing and self-explanatory. The record when complete could not be amended by the Justices. Though Quarter Sessions could on appeal rectify slips under 27 & 28 Vict. c. 99, s. 49, this jurisdiction was not extended to the Queen's Bench on *certiorari*. One other statute may be referred to: The Justices Protection Act, 1849, section 13; it gives limited protection against the consequences of an invalid conviction where the person was "actually guilty of the offence *of which he was so convicted*," words which indicate the real offence of which it was intended he should be convicted.

The key to section 76 is found in the form of record created by the Statutory order-book. The section (which applies to orders as well as convictions) cannot be confined to cases where the recorded complaint is right but the initial complaint is defective. Such interpretation would be opposed to the words "upon which the same shall purport to have been made," and would deprive the enactment of all remedial efficacy. Nor can the section be restricted to cases where there was a sufficient conviction correctly stating the offence *in extenso*, for such extended statement is not contemplated in the conviction column. The section deals with cases where the adjudication is in fact substantially right. It consists of two parts, which for clearness I shall describe as A. and B. The former validates the adjudication; the latter authorizes amendment of the summons, charge, or information, which I shall refer to as the complaint.

(1) 20 Cox, 685.

K. B. Div. 1911.

THE KING (U. D. C. ATHY) *v.* JUSTICES OF KILDARE.

Gibson, J.

Clause A is imperative, using the word "shall." It is confined to defects, omissions, or variances in the complaint, but extends to *any* such defects, &c. Once the statutory conditions are satisfied, the conviction or order shall not be held void or be quashed; it is made unimpeachable automatically. Does "any" here include all defects, &c, substantialas well as formal, such as are made innocuous before adjudication by section 39 of the Petty Sessions Act? The provision is quite unlike 12 & 13 Vict. c. 45, section 7, which has been interpreted in a narrow sense. The only apparent limitation of the word "any" is found in the conditions. If there is no misleading or prejudice, and if the merits are not affected, the statutory consequence would seem at once to attach. Again, what Court is to decide as to the fulfilment of the conditions, and on what materials? No Court is mentioned. The word "quashed" is peculiarly appropriate to *certiorari*, but it includes reversal by Quarter Sessions on appeal (as in the Justices Protection Act, section 2), or by a Superior Court on case stated, an alternative form of appeal. The expression "no conviction shall be held void or shall be quashed" is absolutely general, and must at least embrace all Courts entitled to deal with the conviction or order directly, including this Court on *certiorari*. If jurisdiction on *certiorari* is contemplated by Clause A, as I hold, the King's Bench must decide as to the existence of the prescribed conditions, and must for that purpose ascertain on affidavit what was the true charge founding the conviction or order below: *R.* v. *Tabrum* (1). As *certiorari* applies to adjudications of Justices at Quarter Sessions on appeal, as well as to adjudications at Petty Sessions, Clause A would seem to include convictions or orders at Quarter Sessions where the basis of the adjudication was a defective complaint. Clause A is silent as to amendment. The adjudication is made invulnerable if the statutory requisites are found to exist.

Clause B has a different object. It confers jurisdiction to amend the complaint, using the word "may." The previous conditions found in Clause A are not repeated; the amendment is not expressed to be for the purpose of correcting defects, omissions, and variances; any amendment in the complaint is authorized

(1) 71 J. P. 325; 97 L. T. (N. S.), 551.

which may be requisite for making the conviction or order conformable with the same, or for raising the real question at issue and deciding the case as justice shall require. The amending tribunals are to be the Justices "at the original hearing" or "any Court of Appeal or Superior Court." The clause suggests many difficult questions. Does the expression "Justices at the original hearing" refer to the time of the adjudication (when under section 39 of the Petty Sessions Act the Justices had already extensive powers of amendment)? or does it refer to the constitution of the Court so as to enable the Justices who sat at the original hearing to amend (subject to restrictions) in a somewhat similar way to that allowed in England? Does the Superior Court spoken of mean all the three Common Law divisions then exercising identical appellate jurisdiction on case stated? Or does the term include the King's Bench exercising peculiar and exclusive jurisdiction on *certiorari*? If so, could the King's Bench amend in respect of a conviction affirmed by Quarter Sessions, itself a Court of Appeal? Does the inclusion of *certiorari* jurisdiction in Clause A, where the Court must inquire into merits and the actual facts found and decision below, point to similar inclusion in Clause B? Is this Court, if the complaint as recorded is imperfect or mistakenly recorded, entitled to correct it so as to agree with the actual adjudication? Can a defendant by resorting to *certiorari* instead of appeal or case stated avoid the remedial operation of Clause B?

On none of these points (which illustrates how B differs from A) do I express any opinion, as I hold that the omission in the complaint before us did not mislead or prejudice the defendant, and did not affect the merits; Clause A applies, and no amendment is necessary.

3. The date of the addition in the column of the order-book "as set forth in the summons" after the original words "cause of complaint" has not been stated, but it was made before 1858, when *Lalor's Case* (1) was decided. See *Daly's Case* (2).

The alteration was not authorized by the 36th section of the Petty Sessions Act, and was inaccurate and misleading. A complaint might be contained in an information, or might be made

(1) 7 I. C. L. R. 438. (2) [1898] 2 Ir. at p. 698.

K. B. Div. 1911.

THE KING (U. D. C. ATHY) *v.* JUSTICES OF KILDARE.

Gibson, J.

in an oral charge (as in *Lalor's Case* (1)) the defendant being present, or might be set forth in a summons which might be amended. The present form has been construed, ever since it was adopted, as meaning "cause of complaint, and where there is a summons, as set forth in the summons as adjudicated upon. In *Lalor's Case* (1) there was no summons, and no one suggested that the words "as set forth in the summons" could vitiate the complaint or were more than surplusage.

Treating the alteration as unauthorized and inaccurate, does this vitiate every conviction and order made since the present form came into use? Mr. Ronan's argument must go so far. Section 36, however, of the Petty Sessions Act provides that adherence to the statutory form is not compulsory. Where there is substantial sufficiency in effect, and the form used clearly expresses the intention, the proceeding is not invalidated. Here, taking the case as under the Petty Sessions Act, there was, in fact a summons; the defendants were tried and convicted on that charge, and the reference to the summons as stating the complaint would not invalidate the conviction. But I adopt a broader ground for my decision. Supposing that a valid complaint had been in an information or on an oral complaint displacing and superseding a summons, I should hold, as at present advised, that *utile per inutile non vitiatur*, and that the reference to the non-existing summons in the order-book (which should have been struck out) should be disregarded as mistaken and inapplicable. An appropriate charge is a condition of jurisdiction, and a defendant may disprove such condition. But where he shows there was a proper charge on which he was convicted, he does not establish want of jurisdiction or error by the record mistakenly stating that there had been a summons. This has been the accepted view ever since the change was made: *Lalor's Case* (1). If the form was authorized under section 36, Mr. Ronan's argument, so far as relates to all non-summons cases, would be stronger, as he could more plausibly argue that all non-summons cases were effectually excluded from the statutory record. Whether the change was authorized or not, the addition

(1) 7 I C. L. R. 438.

cannot affect the validity of the conviction on the complaint, if the complaint as recorded is good in substance.

I may add that the argument that the record should never state the form in which the complaint is brought before the Court seems rather opposed to the language of section 76, which refers to summons, charge, or information, apparently as recorded, and not as detached from or extrinsic to the record; the words "purport to have been made" describe the recorded complaint to which the recorded conviction or order relates.

The present form being *pro tanto ultra vires*, any variation deemed desirable can be made under 41 & 42 Vict. c. 69. For the reasons already stated, I think it would be best to leave "cause of complaint" in its original form without reference to the manner of complaint—whether by information, summons, or orally. Why section 76 does not use the comprehensive term "complaint" it is not easy to explain.

BOYD, J., concurred in the judgment of the Court that the cause shown against the conditional order should be allowed.

WRIGHT, J., concurred in the judgment of Lord O'Brien, L.C.J.

THE KING (DONOGHUE) *v.* JUSTICES OF CORK.

LORD O'BRIEN, L.C.J.:—

The decision of the magistrates in this matter was impugned on several grounds. One ground that was alleged was bias on the part of one of the magistrates. This ground of attack was disposed of on a separate hearing before my brothers Gibson and Dodd and myself. We held that the existence of bias, conscious or unconscious, was not established.

Other grounds of attack remain to be disposed of by this Court, as at present constituted. The case for the prosecution was for an alleged assault. Some of the defendants were convicted, and upon those who were so convicted a sentence of one month's imprisonment was passed; and the defendants who were so sentenced to imprisonment were also directed to find sureties for good behaviour. It is contended that the direction as to finding sureties for good behaviour renders the judgment invalid,

K. B. Div. 1911.

THE KING (DONOGHUE) *v.* JUSTICES OF CORK.

Lord O'Brien, L.C.J.

inasmuch as it transcends, as is alleged, the statutory limit of punishment.

It is true that the relevant statute, 24 & 25 Vict. c. 100, s. 42, enacts that the defendants on conviction might be sentenced to a certain limit of imprisonment, which, in this case, would have been exceeded if a direction to find sureties for good behaviour or the peace was, in the eye of the law, punishment. But the fallacy of this lies in regarding such a direction as punishment. A direction to find sureties for good behaviour or the peace is not the imposition of punishment; it is merely a precautionary proceeding to prevent misbehaviour. In *Ex parte Harken* (1), a case which was not only followed, but several times approved of, in this country, the Lord Chief Baron is reported (at p. 318) to have said:—

"The ground of the decision is that such a direction is not by way of punishment, but a precautionary proceeding, adopted by the Court to prevent the commission of an offence which, from the evidence before it, it has reason to believe may possibly be committed in case it does not intervene."

He refers later on to the authority of Lord Blackburn, than whom there was not, either in this country or in England, a more distinguished common law lawyer: see also *Halpin* v. *Rice* (2).

So much, then, for this point.

Another point of attack was this, that it was not proved on the part of the prosecution that the man who was assaulted declined to prosecute; but the Record states that he did decline to do so. This statement appears on the face of the Record. We cannot go behind it. To use the language of a distinguished lawyer, we cannot impugn the uncontrollable verity of the Record.

One of the defendants, Edward O'Leary, though acquitted, was directed to find sureties for good behaviour. Was this (mere acquittal) without more sufficient in a Court of summary jurisdiction to authorize magistrates to bind to good behaviour? As the point was not argued at the Bar, I am careful to say, I keep my mind absolutely open on the subject.

(1) Judgments of Superior Courts, p. 316; 24 L. R. Ir. 427.
(2) [1901] 2 I. R. 593.

PALLES, C.B.:—

Many questions argued upon this application, which is one for a *certiorari* to bring up and quash several convictions, were heard and determined by a Court differently constituted; but one only was discussed before the Court of which I was a member, and that is the only one upon which I express an opinion. This one question is as to the effect upon the convictions of the alteration which upwards of fifty years ago, in intended pursuance of the 36th section of the Petty Sessions Act, 1851 (14 & 15 Vict. c. 93), was directed to be made in the form of the Petty Sessions Book contained in Schedule D of the Act.

That section empowered His Excellency with the advice and consent of the Privy Council, to *extend* that form, "so far as *to adapt it* to any like proceedings, either new or not provided for therein." This section was repealed by the Statute Law Revision Act, 1893; a general power of altering the form of the Order Book, without any restriction as to the nature of the alteration, having been previously conferred upon His Excellency in Council, by 41 & 42 Vict. c. 69, sect. 11. It does not appear, however, that any order was made under the latter Act.

The objection taken in argument to the alteration effected by the order is, that the column which in Form D in the Act is headed "cause of complaint," is altered so as to read "cause of complaint *as set forth in summons.*"

In my opinion it is impossible to contend that that alteration is within the power conferred by the 36th section.

Further, I am of opinion that such an alteration, compelling, as it does, the incorporation in convictions and orders of the summonses used to enforce appearance, is inconsistent with the spirit and intention of the entire Act. Its effect is to introduce, into the formal entry which constitutes the conviction, which was intended to be self-contained, and to the validity of which it is essential that it shall contain a statement of that which constitutes the offence for which the punishment awarded is by statute authorized, a document of a more or less informal character, to which, under section 29 of the Act, no objection, even of substance, can be taken.

So far, I am in accord with Mr. Ronan's argument; but when

K. B. Div. 1911.

THE KING (DONOGHUE) v. JUSTICES OF CORK

Palles, C.B.

he proceeds from that premise to conclude that every entry contained in the book in the altered form must necessarily be invalid as a conviction, I cannot agree.

Mr. Ronan's argument is, that the book does not answer the description of the book prescribed by the Act of 1851, and that therefore it is not such an entry as by section 21 of that Act is to be deemed to be a conviction.

I am of opinion that the book, although in one respect irregular, does answer the description of the book described in the statute, and that the entries in it of the convictions sought to be quashed, so far as they are not affected by the irregularity, are entries which are declared by the statute to be convictions; and I am further of opinion that the irregularity in the present case introduced into the book by the words "as set forth in the summons," is separable; and that, when rejected as surplusage, there are left in each of the entries before us, every element which is essential to a valid entry under the Act of 1851.

In arriving at this conclusion, I treat the language used as I learn from the 36th section the Legislature intended it should be treated. That section provides that "no departure from" the several forms in the schedule to the Act (a schedule which includes the form of the Petty Sessions Book D), "or use of any other words than those indicated in such forms, shall vitiate or make void the proceeding or matter to which the same shall relate, if the form used be otherwise sufficient in substance and effect, and the words used clearly express the intention of the person who shall use the same."

Now, the effect of the Order of His Excellency in Council in the present case was two-fold. First, it compelled the entry of the complaint to be that contained in the summons. Secondly, it introduced, into the particular entry from the heading, the words, "as stated in summons," so as to make the entry identical with what it would have been had the book remained in the original form prescribed in the schedule to the Act of 1851, and had the causes of these particular complaints been entered in that book, with the addition "this is the complaint as set forth in the summons." Now, if the complaints as set forth in the summonses did not validly describe offences in respect of which the punishments

awarded were authorized by statute, and if the defects were not of the character of those in respect of which section 76 of the Act 40 & 41 Vict. c. 56 prohibits the conviction being quashed, then the convictions would have been void and should have been quashed, even although the Justices actually tried the defendants on new charges aptly framed, but not entered in the order-book.

But, in the present case, we have not this state of facts. The summonses contain in clear and express language statements, sufficient in substance and effect, of criminal offences which the Justices had jurisdiction to try summarily, and in respect of which the statute creating them authorized the punishments awarded. It therefore seems to me, assuming as I do the altered form of order-book to be unauthorized, that the only unauthorized statements in the orders in this particular case were the harmless statements that the charges in the order-book were those set forth in the summonses. This is mere surplusage, and *utile per inutile non vitiatur*.

In my opinion, the application, so far as it is rested upon the questions discussed before the Court of which I was a member, ought to be refused.

I hope I shall not be deemed to exceed my duty by expressing the hope that, now that the attention of the Executive Government has been called to the irregularity of the order in Council due steps will be taken under the Act of 1878 (41 & 42 Vict. c. 69, sect. 11) to prescribe a new order-book, which, whilst being in accordance with modern requirements, shall also carry out the spirit and intention of the Act of 1851.

GIBSON, J.:—

Besides the objection to the form of the order-book dealt with in the previous case, there were two other objections to the convictions in this case.

The first was that, comparing section 42 and section 43 of the Act of 1861 together, there was no jurisdiction to bind over. A successful prosecutor as well as a successful defendant may be bound over. Security for the peace is not punishment. The quasi-obligatory provision in section 43 requiring binding over does not exclude a similar protective order under section 42. In

K. B. Div. 1911.

THE KING (DONOGHUE) *v.* JUSTICES OF CORK.

Gibson, J

any case, I doubt if the addition, even though unauthorized, could be treated as an inseparable part of the conviction proper in such a way as to invalidate it. An order binding over is not appealable; and in an unreported case under the Crimes Act this Court held that reversal of a conviction on appeal did not discharge the portion of the adjudication ordering security, though the order might have been impeachable on *certiorari*, there being no facts sufficient to warrant it.

As to *Johnson's Case* (1), if correctly reported, the decision must have been given *per incuriam*, as it is settled law that all the material averments in a valid summons must be taken to have been proved, and they need not be separately found in the conviction or order: *Sheahan's Case* (2).

As to O'Leary's case, where the complaint was dismissed without prejudice, but the defendant was bound over, no doubt there was jurisdiction if the facts to justify the order were stated, just as there is jurisdiction to make such order against a successful complainant, as in *Wilkin's Case* (3). No such facts are disclosed on the face of this order; but, as the point was not argued, and may not be open, and as no penal consequences were imposed for disobedience to the order, I need not discuss the point, which I only notice to avoid misconception hereafter.

BOYD AND KENNY, JJ., concurred in the judgment of the Court refusing the writ of *certiorari*.

WRIGHT, J., concurred in the judgment of Lord O'Brien, L.C.J.

Solicitor for the Athy Urban District Council: *Valentine Kilbride.*

Solicitor for Miss Maire Malone: *P. J. Byrne.*

Solicitor for Donoghue and others, prosecutors in the case of *The King* (*Donoghue*) v. *Justices of Cork*: *Charles William Ashe.*

Solicitor for the Crown in last-mentioned case: *Malachy Kelly.*

J. G. T.

(1) 43 I. L. T. R. 112.

(2) [1907] 2 Ir. at p. 12.

(3) [1907] 2 K. B. 380.

COFFEE *v.* McEVOY AND ANOTHER (1).

(1910. No. 10118.)

K. B. Div.
1912.
Jan. 25, 26.
Feb. 1, 5.

Negligence—Injuries sustained by trespasser—Landlord and tenant—Overholding—Demand of possession—Execution of warrant—Relation back—14 & 15 Vict. c. 92, sect. 15—Owner of house whether under any liability to trespasser for safe condition of premises.

In an action to recover damages for personal injuries sustained through the negligence of the defendants, evidence was given that the plaintiff (who was a minor of six years of age) resided with his parents in two rooms on the first floor of a tenement house; the parents had held these rooms on a weekly tenancy from the defendants: the stairs and landings were kept by the defendants under their own control. On the 8th of August, 1910, the defendant served a notice to quit upon the parents; this notice expired on the 15th; on the 16th demand of possession was made; on the 17th a summons under the Summary Jurisdiction (Ireland) Act, 1851, was issued to recover possession of the premises; on the 22nd the infant plaintiff fell through an open window on the same landing as the rooms, to the yard below, a distance of some 24 feet; on the 25th an order for possession was obtained from the magistrate.

Held, on these facts, that the infant plaintiff and his parents were trespassers, and there was therefore no obligation on the landlord to maintain the premises in such condition as to prevent the child falling through the window in question.

MOTION to set aside verdict. The plaintiff, an infant suing by his father as next friend, claimed damages for personal injury sustained by reason of the negligence of the defendants, who were husband and wife, and the owners of the premises upon which the accident occurred.

The following is the statement of claim:—

1. The claim of the plaintiff, who is an infant suing by Andrew Coffee, his next friend, is, that he has suffered damage from personal injuries, sustained by him on the 22nd day of August, 1910, by reason of the staircase at the house 46 Queen

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and GIBSON, J.

K. B. Div. 1912.

COFFEE v. McEVOY.

Street, in the city of Dublin, being out of repair, unprotected, and dangerous to persons lawfully using the same.

2. The said house was owned by the defendants, and the rooms in said house were let out by them to different tenants, the defendants retaining the possession and control of the said staircase, which was the only mode of access to the said rooms.

3. At the time when he sustained the said injuries the plaintiff was lawfully using the said staircase.

The plaintiff claims £500 damages.

The defendants delivered a statement of defence as follows:—

1. The defendants deny that the staircase of the house, 46 Queen Street, was out of repair, unprotected, or dangerous, as in the first paragraph of the statement of claim is alleged, or at all.

2. The defendants deny that they are the owners of the said house, and deny that the rooms in the said house were let out by them to different tenants, or that the defendants retained possession or control of the said staircase.

3. The defendants deny that the plaintiff was lawfully using the staircase of the said house at the time of the alleged accident, and say that the plaintiff was not a guest, servant, or customer of, or otherwise invited on the premises by a tenant of the said premises or any portion thereof.

4. The defendants say that the plaintiff was at the date of the alleged accident a trespasser on the said premises.

5. The defendants deny that the plaintiff suffered all or any of the damage alleged.

6. Admitting for the purpose of this defence, but not further or otherwise, that the defendants, or either of them, were or was the landlady or landlord of the said house, the said defendants deny that they or either of them were or was bound or under any obligation to repair the said premises or the staircase.

7. The defendants will submit at the trial of this action that the statement of claim discloses no cause of action.

The action was tried before Dodd, J., and a common jury of the city of Dublin, on November 17th, 1911.

The following facts appear from the Judge's report of the evidence taken on the trial:—Plaintiff's mother took two rooms on the second floor of the tenement house, 46 Queen Street, Dublin, from the defendants, and paid some rent in advance, the tenancy being a weekly one; the stairs were not part of the take, and there was a landing outside the rooms, and on this landing a window looked out upon the yard below. After two weeks' rent had been paid, she complained of the bad repair of the rooms, and also of the condition of the window on the landing, and refused to pay any more rent until the place was repaired; thereupon, on the 8th of August, defendants gave a week's notice to quit; this notice expired on the 15th of August, and possession was demanded on the 16th; on the 17th a summons to recover possession of the premises was issued, and on the 25th of August the magistrate gave the decree for possession. About six days before the accident two workmen came and removed the lower half of the window, and left it lying against the wall; the mother of the plaintiff further alleged that on this occasion she spoke to one of the workmen, and asked what was he going to do with the window, that it was in a dangerous condition, and why would he not lath it? On the 22nd of August she left two of her daughters, one aged 17 and the other 15, in charge of the plaintiff while she herself was absent, and when she returned the boy had been removed to hospital. Other witnesses for the plaintiff gave evidence that the boy fell out of the open window on the landing to the yard below, a distance of 24 feet, and sustained very severe injuries.

At the conclusion of the plaintiff's case, counsel for the defendants asked for a direction on the grounds that the plaintiff was a trespasser, defendants owed no duty to him, that there was no evidence of negligence on the part of defendants or that they knew of the danger, nor was there any evidence that the two men who were alleged to have removed the window were in the employment of the defendants. The Judge declined to so direct.

The witnesses for the defence gave evidence to show that the lower half of the window, which was alleged to have been removed, was not self-supporting, and would not stay up unless

K. B. Div. 1912.

COFFEE v. McEVOY.

it was propped, and that there was a lath on each side of it which could only be removed by a chisel, that no complaint had been made to the defendants by the plaintiff's parents concerning this window, that it had not been removed by any workman of theirs, and one of the defendants' witnesses, named Emily Sullivan, stated that she had seen Mrs. Coffee take out the window some days previous to the accident, and that she (witness) had put it back.

The following questions were submitted to the jury:—

1. Was the window at the time unsafe for children resident in the house?

2. Was the window in fact left in an unsafe condition by persons in the employment of the defendants acting within the scope of their authority?

3. If so, was it so left negligently?

4. Did the defendants know, or by the exercise of reasonable care and diligence ought they to have known, that the window was unsafe for children resident in the house?

5. Was the plaintiff a child resident in the house at the time of the occurrence.

6. Did the defendants know that the landing would be used, and the window approached, by children resident in the house?

7. Damages?

The jury having asked whether they could find a verdict without an answering of No. 2 and the questions following consequent upon it, the Judge said he would frame substituted questions on that basis, and would relieve the jury from findings on questions 2, 3, and 4 in the original paper.

The questions on which the jury found, with their answers, are as follows:—

ON THE ORIGINAL PAPER.

1. Was the window at the time unsafe for children resident in the house? Answer—"Yes."

5. Was the plaintiff a child resident in the house at the time of the occurrence? Answer—"Yes."

6. Did the defendants know that the landing would be used, and the window approached, by children resident in the house? Answer—"Yes."

7. Damages? Answer—"£50."

ON SECOND PAPER.

1. Did the defendants take reasonable precautions to prevent the window from being dangerous to young children resident in the house? Answer—"No."

2. If you answer "No," then state what reasonable precautions they omitted? Answer—"Reasonable guard."

3. Could the defendants have reasonably anticipated that the window might be taken from its sash, leaving an unprotected opening? Answer—"Yes."

Upon these findings the jury found for the plaintiff with £50 damages by direction of the Judge. The Judge gave judgment for the plaintiff for £50 with costs.

The learned Judge's report further stated that "at the close of the defendants' case Mr. Jefferson renewed his requisition. He objected to any questions being put. I asked counsel for the plaintiff did they think they had any evidence of the window having been in fact taken out of the sash by servants of the defendant. They pressed the question, and I drafted the first question paper submitted to the jury on this basis. The certificate of the Registrar correctly sets the questions put. The case mainly made was, that the defendants were brought into privity with the taking out of the sash on the occasion referred to. If the sash was removed by servants of the defendants, acting negligently, and if there was a duty to the plaintiff on the occasion from the defendants to take care, that would seem to conclude the matter.

"If it was necessary to prove that the defendants knew, or reasonably ought to have known, that the window had been in fact left open and so unsafe, there was no evidence of any complaint or notice by anybody during the six days to bring knowledge home to the defendants. Mr. Jefferson objected to my charge, but I think it was not unfavourable to him. I did not attach

K. B. Div. 1912. COFFEE v. McEVOY.

much weight to Mrs. Coffee's evidence, and I thought even if the jury did believe her, the evidence fell short of showing that servants of the defendants did the act. I interpreted question 4 on the original paper as being pointed to the particular unsafeness of leaving the window open. I desire to state this clearly, in order that Mr. Jefferson's objection that the case was recast in what subsequently happened may have full force. It will be observed that the questions put to witnesses as to circumstances outside the particular act complained of were mainly put either by the Judge or by the jury. Mr. Jefferson identified the boy with his parents; they were all trespassers; there was no duty. Mr. O'Connor relied on Mrs. Coffee to prove specific negligence by servants of the defendants on the occasion.

"After a considerable absence the jury returned to Court and said they wished some information or guidance on questions 2, 3, and 4, and asked me to state whether it was necessary to find that the acts were, or were not, done by servants of the defendants. They indicated the view that was outlined in the questions they had put to Mr McEvoy. I said I could not omit 2, 3, and 4 without putting substituted questions. I framed them as they appear in the second paper, with which they intimated their approval. Those were the questions they said they desired. Mr. Jefferson protested strenuously against any alteration. I was altogether dissatisfied with the questions in the original paper. I thought I ought to put the other questions. To give Mr. Jefferson every opportunity of challenging the action of the jury and my ruling, I give a pretty full abstract of what I then said. I stated that, having regard to the facts that the window was under the control of the defendants, they must be taken to have known of its construction, of the ease or difficulty with which it could be opened or removed from its sash; that all persons resident in the house had access to the window; that the house was a tenement house; that there were known to be persons of tender years residing in the house, I thought the duty—and I so directed them in point of law—was cast upon the defendants to take reasonable precautions to prevent the window being in such a position as to be dangerous to young children residing in fact in the house, and that not merely from the acts of their own servants

but also from the acts of any person who had access to the window. The witnesses for the defendants, the Sullivans, if they were to be believed, pointed to the window being capable of being easily removed. Emily Sullivan said Mrs. Coffee removed it. She said she herself put it back. She said there was no lath. The fact that the window could not be kept up owing to there being no weights—a fact elicited by themselves—would require their consideration. The entire of the facts called for their scrutiny and careful consideration. Mrs. McEvoy said she had the window repaired by Mr. Webb. The plaintiff must satisfy the jury that some particular precaution was omitted. The law did not permit them to find a verdict of a general kind. Instead of formulating particulars myself, or requiring the plaintiff's counsel to frame particulars, I must put it upon the jury if they found "No" to question No. 1 on the paper then submitted, to state the precautions which they thought should have been taken. Could an owner of a tenement house reasonably have anticipated that some such occurrence as did take place might take place, and what precautions ought he reasonably to have taken to avoid its happening? Mr. Jefferson objected to my putting the questions, and also to the time at which they were submitted. The jury answered them as appears on the certificate."

Jefferson, K.C. (with him *Denis Henry, K.C.*, and *John H. S. Russell*), moved to set aside the verdict.

The tenancy expired on the termination of the notice to quit: *Haren* v. *Archdale* (1). From the time possession was demanded and refused the parents were trespassers. The plaintiff was in the same position as his parents, and a landlord owes no duty to a trespasser: *Lowery* v. *Walker* (2); *Grand Trunk Railway of Canada* v. *Walter Barnett* (3); *In re Bernina* (4); *Barker* v. *Herbert* (5); *Murley* v. *Grove* (6).

James O'Connor, K.C., and *Hanna, K.C.* (with them *Louis Kelly*), contra:—

The plaintiff was lawfully on the premises, for sub-section (3)

(1) 14 L. R. Ir. 296.
(2) [1911] A. C. 10.
(3) [1911] A. C. 361.
(4) 12 P. D. 36.
(5) [1911] 2 K. B. 633.
(6) 46 J. P. 360.

K. B. Div. 1912.

COFFEE v. McEVOY.

of section 15 of the Summary Jurisdiction Act, 1851, under which the summons for possession was brought, gives a period of not less than seven days before the warrant for possession can be executed, and the accident occurred three days before the warrant was granted. Having regard to the tender age of the plaintiff, this open window was a trap; there is evidence that it was removed by defendants' men; the defendants are liable: *Cooke* v. *Midland Railway of Ireland* (1); *Creed* v. *Sullivan* (2); *Collins* v. *L. N. W. Ry.* (3); *Fenna* v. *Clare* (4).

Denis Henry, K.C., in reply:—

Notwithstanding sub-section (3) of section 15 of the Summary Jurisdiction Act, 1851, the plaintiff and his parents were trespassers: *Jones* v. *Foley* (5); *Beattie* v. *Mair* (6).

Feb. 5.

LORD O'BRIEN, L.C.J.:—

This was an action for damages for personal injuries sustained by the infant plaintiff, who sued by his father as next friend. The ground upon which it is sought to impose liability on the defendants is stated in the writ to be the negligence of the defendants, and the statement of claim alleges that the plaintiff was lawfully on the premises referred to in the case. The defendants traverse the allegation that the plaintiff was lawfully on the premises, and allege that he was a trespasser. The dates are most important, and it is essential that they should be clearly borne in mind in considering the case. It appears that the father and mother of the infant plaintiff had been tenants of certain rooms in a tenement house in this city, and that the accident occurred in this house on the 22nd of August. We must look both backward and forward from this date. It is the crucial date in the case. We must ascertain the status of the plaintiff and his parents on this date, and the obligation of the defendants to them. The father and mother of this child of six years of age held under a weekly tenancy; notice to quit was served on them on the 8th of August;

(1) [1909] A. C. 229, at p. 234.
(2) [1903] 2 I. R. 317.
(3) 16 Q. B. 984.
(4) [1895] 1 Q. B. 199.
(5) [1891] 1 Q. B. 730.
(6) 10 L. R. Ir. 208.

this notice expired on the 15th; possession was demanded on the 16th; on the 17th, possession having been refused, an ejectment summons was issued; the accident occurred on the 22nd; and on the 25th, the magistrate issued his order to eject them. Why is it so essential to bear these dates in mind? Because they show the various steps taken by the defendant, William J. M'Evoy, to put these people out. These dates make it clear that there can be no ground for suggesting that there was any relaxation whatsoever in his efforts to carry out his determination; trespassers they were, and trespassers he was determined they should remain. There could be no suggestion that they were there by licence or permission. They were, in fact, persistent trespassers. No doubt, the child lived with his parents. He was a very young child, and I daresay he wandered about the passages. He lived with his trespassing parents, and the window at the end of one of the passages was open, and he fell through it. But what obligation was there on the defendants towards him? No doubt, as I have said, the plaintiff was a child of tender years, and was an adjunct, so to speak, of his parents. He himself could not go elsewhere, nor could the defendants have brought him elsewhere, and certainly the parents could not by persistence in trespassing make the defendants responsible for alleged commission or nonfeasance in respect of a child they should have brought elsewhere.

Counsel for the defendants, who aptly took every point, pressed on the Court that there was no obligation towards a trespasser; and, in my opinion, he was right in so pressing that point in the circumstances of the present case. There is no obligation on a landlord to repair his premises for the benefit of a trespasser. In my opinion, mere omission gives no cause of action to a trespasser. The case may, *perhaps*, be otherwise if there be an affirmative act, an act of commission wilfully done—if, say, the landlord of a house so alters it that the alteration may have the effect of a trap for a person who, without any title or permission, or licence, is, to the knowledge of the landlord, using that portion of the house where the alteration has been made. But that is not this case. There is no such thing as a trap here. It will be noticed that I used the word "perhaps," and I did so because I feel that speculation as to supposititious cases may embarrass if concrete instances

K. B. Div. 1912. COFFEE v. McEVOY. Lord O'Brien, L.C.J.

present themselves hereafter. There was, in my opinion, no obligation on the part of those employed by the defendants to take directions from the plaintiff's mother, or carry out her suggestions. The care of this very young child attached exclusively to her. If the owner of a tenement house were under an obligation towards an errant young trespasser to repair, re-cast, or modify the form of the house, there would be no end to a landlord's responsibilities. Trespassers must take the place in the condition in which it is. If they are in or get into a house, there is, in my judgment, no obligation—at all events, in a case like this—which would require the owner to alter or repair the premises. It would be a very serious responsibility, indeed, if an obligation existed to repair the house, or alter its form, or to put up protective appliances, for the benefit of trespassers.

The case of *Cooke* v. *Midland Railway Co.* (1), which I myself tried, so far from being an authority for the plaintiff, is rather an authority against him. That combination of special circumstances which formed the basis of the decision in that case does not exist here. Another case that was pressed before us as sustaining—to some extent at least—the plaintiff's case was *Grand Trunk Railway of Canada* v. *Barnett* (2). But even this case—as Mr. Henry strongly urged—is in favour of the defendants here. In considering it, it should be remembered that Lord Macnaghten, who took part in deciding *Cooke* v. *Midland Railway Co.* (1), concurred with Lord Robson.

After reviewing a great many cases, Lord Robson proceeds:—"The general rule, therefore, is that a man trespasses at his own risk. This is shown by a long line of authorities, of which *Great Northern Railway Co.* v. *Harrison* (3), *Lygo* v. *Newbold* (4), and *Murley* v. *Grove* (5) are familiar examples." The last case (*Murley* v. *Grove* (5)) referred to by Lord Robson certainly goes very far.

Later on Lord Robson says:—"Again, even if he be a trespasser, a question may arise as to whether or not the injury was due to some wilful act of the owner of the land involving

(1) [1909] A. C. 229.
(2) [1911] A. C. 361.
(3) 10 Ex. 376.
(4) 9 Ex. 302.
(5) 46 J. P. 360.

something worse than the absence of reasonable care. An instance of this occurred where an owner placed a horse he knew to be savage in a field which he knew to be used by persons as a short cut on their way to a railway station: *Lowery* v. *Walker*" (1).

And then follows the passage that was relied on for the plaintiff:—"In cases of that character there is a wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care." I cannot find evidence of any such thing here. I do not think there is evidence even that the defendants knew of the state of this window.

On another aspect of the law relating to this case, Mr. Henry has cited an important and useful case, *Jones* v. *Foley* (2). That case was decided on 1 & 2 Vict. c. 74, a statute containing an enactment of a similar character to that contained in 14 & 15 Vict. c. 92, s. 15, under which the summons to recover the premises in this case was brought by the defendants. It was contended for the plaintiff that, as sub-section (3) of section 15 of 14 & 15 Vict. c. 92, to which I have referred, allowed a period of not less than seven days to elapse before possession could be forcibly taken from the plaintiff, therefore the plaintiff was lawfully in possession here at the time of the accident. But *Jones* v. *Foley* (2) shows that, though there may be this stay of execution before actual ouster, still the legal character of the person to be ousted is not altered thereby; that, in fact, a trespasser he was and a trespasser he remained.

On the whole, then, without going into all the elaborate discussion of the many cases that have been so liberally discussed, I think that the truth is that this man and his family were trespassers from the date of the demand of possession, and that trespassers they remained to the end; that there was no breach of duty, or anything to incur responsibility, on behalf of the defendants, and that, therefore, this judgment should be set aside and judgment entered for the defendants, with costs.

(1) [1911] A. C. 10.

(2) [1891] 1 Q. B. 730.

K. B. Div. 1912.

COFFEE *v.* MCEVOY.

PALLES, C.B.:—

This case, which has been extremely well argued, is a sad one. Its subject-matter is serious injuries sustained by a child of tender years—I believe of five or six years of age. Sympathy, however, has no place in the consideration of dry questions of legal liability such as we have here.

The fact alleged in the statement of claim as that out of which the duty of the defendants to use due care is said to arise is, that the plaintiff, at the time of the accident, was lawfully using the staircase.

Had this fact been sustained in evidence, I should have been prepared to hold that the defendants, by reason of their having let the room in question to the plaintiff's parent, subjected themselves to a duty to the plaintiff, as one of the residents in the room, to use reasonable care to maintain the staircase in a reasonably safe condition for the plaintiff to go up and down.

This fact, however, was admittedly disproved. The plaintiff's father was a weekly tenant. On the 8th August notice was served to quit on the 15th. On the 16th possession was demanded, and the father and his family, including the plaintiff, were thenceforth trespassers. It is admitted that on the next day, the 17th, a summons for the delivery up of the possession under 14 & 15 Vict. c. 92, sect. 15, was served by the defendant, William. The accident occurred on the 22nd, after the service of this summons, and on the 25th August a warrant to the police Inspector to give possession to the defendant within the statutable period was issued by one of the Dublin Justices, and possession was duly given to the defendants thereunder.

Thus the defendant from the time his title to possession accrued until he received the actual possession did all that in him lay to disaffirm the right to possession of the plaintiff's father, and to prevent his continuance in the room being recognized as a lawful possession.

It is said that, as sub-section (3) of section 15 of the above-mentioned Act requires that a period of not less than seven or more than ten clear days shall elapse between the date of the warrant and the date at which the possession is to be given

to the landlord, the plaintiff's father must be taken to have had a lawful right to possession from the expiration of his tenancy to the day on which possession was directed to be taken: *Jones* v. *Foley* (1), decided on an enactment of a similar nature, 1 & 2 Vict. c. 74, is an authority to the contrary. There, Day, J., in referring to the statutable suspension for twenty-one days of the warrant, says:—"But the issue of that warrant did not in any way affect the rights of the parties; it neither extended the rights of the tenant nor limited those of the lessor. Its only effect was to enable the defendant, after the expiry of the twenty-one days, to *forcibly* enter upon the premises, which, apart from the warrant, she could not lawfully do"; and the judgment of Lawrance, J., is to the same effect. Agreeing as I do in the reasons of this decision, it is unnecessary for me to discuss the matter more fully.

I conceive that the question whether the plaintiff was lawfully using the staircase at the time of the accident depends upon whether his father was then in lawful possession of the room, and being of opinion that, upon the execution of the Justices' warrant, the possession obtained by the defendants thereunder of the room related back to the day their title accrued, on the 16th August, I am coerced to hold that the possession of the plaintiff's father of that room was at that time wrongful, that he was then a trespasser therein, and consequently that the infant plaintiff was not at the time of the accident lawfully using the staircase, but was a trespasser thereon.

Thus the fact upon which the plaintiff's cause of action rested was absolutely disproved before the close of his case. I am therefore of opinion, with much deference to my brother Dodd, that in accordance with the requisition of the defendants' counsel, he should at that time have directed a verdict for the defendants, unless the plaintiff's counsel applied for an amendment.

Further, having regard to the unsettled and critical state of the law on the nature of the duty due by the owner of real property to a trespasser thereon—a matter which Lord Loreburn, L.C., in *Lowery* v. *Walker* (2), states to be "somewhat wide and not free from many difficulties," and on which the Earl of Halsbury and Lord Shaw declined to give any opinion—I should have

(1) [1891] 1 Q. B. 730. (2) [1911] A. C. 10.

K. B. Div. 1912.

COFFEE v. McEVOY.

Palles, C.B.

preferred that my learned brother before permitting the case to proceed should have required the plaintiff's counsel to give a statement of the exact duty upon which he insisted the defendants were under to the plaintiff, and of the facts or alleged facts from which it arose.

My brother Dodd, however, anxious as I suppose, by reason of the poverty of the parties, that if the plaintiff was, upon any view of the facts proved, entitled to recover, the expense of a second trial should be avoided, did not think fit to adopt this course, but having heard the evidence called for the defendants, left to the jury a set of questions, which I understand were suggested by the plaintiff's counsel, which appear to have for their basis the proposition that, although the plaintiff were a trespasser (which appears to me not to have been disputed at this stage of the trial), he could sustain an action, if the window was unsafe for children resident in the house, who, the defendants knew, might approach it, and was left in such unsafe state by persons in the employment of the defendants, acting within the scope of their authority; or if the defendants knew, or ought to have known, that it was in an unsafe condition.

Now if the defendants knew, or ought to have known, that the window was unsafe for resident children, who would probably approach it, I agree that they would owe a duty to *such of those children as were lawfully resident there*, under such a contract of tenancy as existed till the 15th August, to use due care to put the window in a condition safe for them; but the contention that this duty is due to any trespassing child resident there against the defendants' will comes perilously near to the celebrated *dictum* of Lord Esher, M.R., in *Heaven* v. *Pender* (1), by which he was at first understood to enunciate as a general rule that whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense would at once recognize that if he did not use ordinary care and skill in his own conduct, with regard to these circumstances, he would cause danger of injury to the

(1) 11 Q. B. D. 503.

person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Understood in these general terms, it was on the moment dissented from by Lord Justice Cotton and Lord Bowen; but we now know, from the judgment of Lord Esher himself in *Le Lievre* v. *Gould* (1), that, however general his words may have been, they were intended to apply only to the facts of the particular case before him.

The jury, however, were unable to agree upon the first set of questions, and, if they were rightly left to the jury, the plaintiff would be entitled, if the present verdict cannot be sustained, to a new trial. Ultimately the questions on which the verdict was found were the following:—

Was the window at the time unsafe for children resident in the house? Answer—"Yes."

Was the plaintiff a child resident in the house at the time of the occurrence? Answer—"Yes."

Did the defendants know that the landing would be used, and the window approached, by children resident in the house? Answer—"Yes."

Did the defendants take reasonable precautions to prevent the window from being dangerous to young children resident in the house? Answer—"No."

If you answer "No," then state what reasonable precautions they omitted. Answer—"Reasonable guard."

Could the defendants have reasonably anticipated that the window might be taken from its sash, leaving an unprotected opening? Answer—"Yes."

Thus, we have to determine two questions:—

1. Would the mere facts that the defendants might have reasonably anticipated that the sash might have been taken from the window, and that they did not take reasonable precautions to have it replaced, entitle the plaintiff to judgment?

If we determine this question in the affirmative, the verdict must stand.

(1) [1893] 1 Q. B. 491.

K. B. Div. 1911.

COFFEE v. McEVOY.

Palles, C.B.

2. Whether, if the jury were of opinion that the lower sash of the window was taken away by the defendants servants, acting within the scope of their authority, and that the plaintiff's injuries were caused thereby, he would be entitled to recover?

I think it unnecessary to consider whether there was evidence fit to be submitted to the jury on the second question, as there was not at the trial any evidence that the sash, if taken out by the defendants' servants, was so taken out otherwise than for the purpose of repair.

Now, although the plaintiff's father was in actual possession of the room at the time of the injuries, he must be treated, by reason of the relation I have mentioned, as out of possession. He and the defendants could not both be in possession at the same time. The contractual relation between them must be deemed to have wholly terminated. There is no shadow of evidence of invitation or of licence, such as was relied on in *Indermaur* v. *Dames* (1) and *Gautret* v. *Egerton* (2), or of any omission to give warning to the trespassing father which could bring the case within the decision in *Cooke* v. *The Midland Railway* (3) or *Lowery* v. *Walker* (4), and, consequently, to my regret, I feel bound to hold that the status of the plaintiff at the time was that of a wandering child, with the same rights only as if he had entered from the street, and thereby became a trespasser—an involuntary one, indeed, by reason of his age—but still a trespasser, between whom and the defendants there must be deemed to have been no relation whatsoever other than that of mere strangers.

In consequence of the reservation of opinion of the Law Lords in *Lowery* v. *Walker* (4) I have considered with care all the authorities I could find on the subject (many in addition to those cited during the argument), including those of the class of *Ilott* v. *Wilkes* (5), *Bird* v. *Holbrook* (6), *Deane* v. *Clayton* (7), and *Jordin* v. *Crump* (8), in which the opinion of Gibbs, C.J., in *Deane* v. *Clayton* (7), was adopted by the Court of Exchequer, and the

(1) L. R. 1 C. P. 274.
(2) L. R. 2 C. P. 371.
(3) [1909] A. C. 229.
(4) [1911] A.C. 10.
(5) 3 B. & A. 304.
(6) 4 Bing. 628.
(7) 7 Taunt. 489.
(8) 8 M. & W. 782.

cases cited in the judgments of Darling, J., and Vaughan Williams and Kennedy, L.JJ., in *Lowery* v. *Walker* (1), and I cannot find one in which it was held that the occupier of the land trespassed upon was under any legal obligation to a trespasser to do anything to protect him. I am of opinion that the act which will constitute a breach of any obligation to a trespasser must be one of commission, not of omission. I distinguish an obligation to do from an obligation to refrain from doing, because I admit that even in such a case there may be an obligation to the trespasser to refrain from doing something that otherwise might be lawful; in other words, there may be an act of commission which may be a breach of duty to a trespasser. For instance, an occupier of a fenced field would be under an obligation to refrain from turning into it a bull known to be ferocious without notice to a person who, to his knowledge, was then actually trespassing thereon, but I can find no trace of an obligation to a trespasser to do any act as, for instance, to repair a fence.

The exact limits of the act otherwise lawful, which he is under an obligation to a trespasser to refrain from doing, are more difficult to define; but I am prepared to hold that neither upon principle nor authority can they extend beyond acts done with the wilful intention of doing harm, and acts the direct and immediate effect of which would be to do harm to the trespasser.

As to *Murley* v. *Grove* (2), a decision of Mathew and Cave, JJ., I must say with deference that my opinion does not go quite so far against the trespasser. It does not place the obligation so high as I think it is. It, however, has never been questioned, and was cited with approval by Lord Robson in delivering the judgment of the Privy Council in *Grand Trunk Railway Company of Canada* v. *Barnett* (3).

That judgment was delivered after the decision of the House of Lords in *Lowery* v. *Walker* (1), and it laid down the duty of the railway company to the respondent there, a trespasser on their train, as being a duty "not *wilfully* to injure him." "They were," it proceeds, "not entitled unnecessarily and *knowingly* to increase the normal risk by *deliberately* placing unexpected dangers in his

(1) [1911] A. C. 10. (2) 46 J. P. 360. (3) [1911] A. C 361.

K. B. Div. 1911. COFFEE v. McEVOY. Palles, C.B.

way." Then, having stated that "the general rule, therefore, is that a man trespasses at his own risk," the judgment later on proceeds, "again, even if he be a trespasser, a question may arise as to whether or not the injury was done by some *wilful* act of the owner of the land, involving something worse than the absence of reasonable care." Of this he considers *Lowery* v. *Walker* (1) one instance, adding, "In cases of that character there is a wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care."

For myself, however, I hold that *Lowery* v. *Walker* (1) was decided on the simple ground, that the plaintiff was lawfully in the place in which the injury happened; and this I also regard as the *ratio decidendi* in *Cooke* v. *The Midland Railway Co.* (2).

I have not adverted to any alleged difference in the liability of the defendants by reason of the tender years of the plaintiff. In some other cases that circumstance might be of importance. Had there been other circumstances to raise the duty to use due care, a jury might consider it a circumstance which required a greater degree of care than would be sufficient in the case of an adult, and it would have prevented the defendants relying as a defence on contributory negligence. I cannot, however, hold that the age of the plaintiff alone under the circumstances of this case was sufficient to impose upon the defendants any duty to him to use due care.

My opinion is—and I have no hesitation in saying I regret it—that the verdict should be entered for the defendants.

GIBSON, J.:—

On the pleadings the defendants were entitled to a direction. Trespass is an invasion of proprietary right, and does not depend on knowledge or wrongful intent. The father was in wrongful possession, and the use of the stairs by him and his family was trespassory.

The pleading was not amended, no ruling was given on the question of trespass, and a wholly novel cause of action was tried.

(1) [1911] A. C. 10. (2) [1909] A. C. 229.

The judge did not direct the jury that the plaintiff was a trespasser, or explain how his position differed from that of a tenant or licensee. He ruled that the defendants were bound to take reasonable precautions to prevent the window from being dangerous to young children residing in fact in the house. The questions to the jury were based on that view of law. There is no finding as to the removal of the sash, either as to persons or time, or that (as was argued by plaintiff's counsel) the open sash-space constituted a dangerous allurement. The questions and answers would support actionable liability if the plaintiff was lawfully using the staircase.

The point for decision is, whether the findings establish legal responsibility if the plaintiff was a trespasser. Many authorities were cited on both sides. I put aside cases where (*a*) there was tacit licence or acquiescence, as in *Cooke's Case* (1) and *Lowery's Case* (2); (*b*) dangerous articles of alluring character are placed in inviting proximity to a highway or place where children may be lawfully passing; (*c*) deterrents from trespass are employed inside the owner's premises, such as guns (before the statute) or spears, directly calculated to injure trespassers, where intruding persons have notice: *Ilott* v. *Wilkes* (3); *Jordin* v. *Crump* (4); (*d*) defensive fortifications to exclude trespassers, such as broken glass on a wall—an illustration used in *Ilott* v. *Wilkes* (3)—or barbed-wire on a hedge or wall; (*e*) the placing or leaving of dangerous articles on the owner's premises in ordinary course: *Ponting* v. *Noakes* (5); (*f*) wilful or direct acts injuring the trespasser.

The principles governing the legal character of a trespasser are clear. Had the parents been plaintiffs, they would have had no cause of action for injuries sustained by them from falling out of the window. They knew of the danger, and, apart from such knowledge, there was no duty on the owner's part to take reasonable precautions to make the premises safe for them: *Murley* v. *Grove* (6), a strong case cited without question in [1911] A. C., p. 370. Whether injury was sustained from the dangerous

(1) [1909] A. C. 229.
(2) [1911] A. C. 10.
(3) 3 B. & Ald. 304.
(4) 8 M. & W. 782.
(5) [1894] 2 Q. B. 281.
(6) 46 J. P. 360.

K. B. Div. 1911.

COFFEE v. McEVOY.

Gibson, J.

condition of the rooms wrongfully occupied, or from the dangerous state of the approach, the result must be the same. The case is one of alleged want of care, not an intentional act done to punish or deceive. The circumstance that the owner elected to eject by process of law, to which a limited stay of execution was by statute attached, does not alter the trespassory character of the occupation: *Jones* v. *Foley*(1). Suppose Coffee had invaded an unoccupied house, and refused to give up possession, making an ejectment necessary, it would be impossible to suggest that the owner was under legal duty to make the house or its approach secure. In legal quality there is no distinction between that case and the present.

The plaintiff's case is rested entirely on his age. His parents, however, were aware of the danger arising out of their own wrongful act in withholding possession, and, as his natural guardians, they were primarily bound to take care of him. The owner's liability, so far as regards want of reasonable safeguards, cannot vary with the ages of the members of the trespassing family. The plaintiff being a trespasser, though an innocent one, cannot complain of negligence — a negative and relative term, denoting absence of due care. On the findings, and taking the pleadings as amended in conformity with them, there is no cause of action.

Counsel for the plaintiff relied on two other points which, though not properly arising on the findings, I shall briefly notice.

The first is, that the removal of the sash was an act of commission or misfeasance calculated to imperil the plaintiff. When this was done does not distinctly appear; it was some days before the accident. The removal was, however, not done with any wrongful intent; if effected by defendants' employees, it was in ordinary, if negligent, course of repair. All repairing work involves doing something. For some purposes negligence in effecting repairs, or in construction, may be described as misfeasance, but it would not be such misfeasance as would here support a right of action.

(7) [1891] 1 Q. B. 730.

The second point is, that an open window was an allurement to young children, and might be regarded, from their want of sense, as a kind of trap. I do not think that an open window, though dangerous, could be considered such an allurement as would give a cause of action. The window was part of the structure which the owner was not bound to maintain for the Coffees' benefit; and what is complained of is negligence in relation to repair of the fabric. All the examples of allurement deal with attractive articles placed by voluntary act in a tempting position and proximity to some place of lawful resort. An orchard is alluring, and may attract marauding enterprise, but I think the owner might put glass or spikes on the wall without being regarded as a tempter, or incurring responsibility to youthful or other depredators injured in the attempt to climb over. I do not see that the window was a trap. It was not so intended; it was, no doubt, a source of possible danger to small children, but no more than a broken stair or banister, or hole in the floor. It is the parents' case that they saw this danger which they describe as manifest.

No authority has been cited at all supporting the plaintiff's supposed cause of action, and I decline to create a new and dangerous extension of liability in favour of young trespassers which appears opposed to sound legal principle. All must regret the plaintiff's injury, for which, if lawfully on the premises, he could have obtained redress, but, as the case stands, the defendants are not responsible; it is the boy's parents who are morally to blame; they took the risk, and should have guarded their child.

Solicitor for the plaintiff: *J. J. Mulcan.*

Solicitor for the defendants: *William V. Seddall.*

J. M.

K. B. Div. Mat.
1910.
Nov. 14, 28.
Dec. 19.
1911.
Jan. 23, 24.
April 24.
May 8, 15.
Appeal.
June 13.

SULLIVAN *v.* SULLIVAN (1).

Husband and wife—Divorce proceedings—Costs of wife's solicitor—Compromise—Separate estate—Judgment against wife a bar to subsequent claim against husband.

Where a divorce suit in which the wife was petitioner was settled without notice to her solicitors, who thereupon brought an action against her in which they recovered judgment, upon foot of which nothing was realized, and they afterwards applied for an order that the respondent, the husband, should pay them the wife's costs:—

Held, by Madden, J., that the application should be refused, on the ground that there was evidence that the wife had separate estate, and that the solicitors looked to it for payment.

Held, by the Court of Appeal, that the judgment obtained against the wife was a bar to any claim against the husband.

Priestly v. *Fernie* (3 H. & C. 977) followed, and applied to the case of a debt incurred by a wife as agent for her husband.

MOTION on behalf of Messrs. O'Keeffe and Lynch, solicitors, for an order that the respondent, Patrick Donald Sullivan, be ordered to pay them the sum of £110 9*s.* 9*d.* as and for the costs necessarily and properly incurred by them for, and on behalf of, the petitioner, and by her instructions and authority, in prosecuting the proceedings herein, on the grounds that, prior to the ultimate determination of the said proceedings, the respondent induced and influenced the petitioner to enter into an arrangement with him behind the backs of the said solicitors, and without their knowledge or approval, for the settlement of the differences between them, whereby the respondent induced the petitioner to return to cohabitation with him solely for the purpose and with the intention of endeavouring to defeat the claim of the said solicitors to payment of the said costs, and for the purpose of fraudulently evading payment thereof; or, in the alternative, that the said Messrs. O'Keeffe and Lynch may be permitted to proceed with

(1) Before MADDEN, J.

the trial of this suit for the purpose of recovering the costs to which they are entitled as solicitors for the petitioner.

The circumstances which led up to this application may be shortly stated as follows: On the 3rd March, 1909, a petition was filed by Mrs. Sullivan, seeking a divorce *a mensa et thoro* from her husband. Messrs. O'Keeffe and Lynch, solicitors, of the city of Cork, were the solicitors for Mrs. Sullivan. No application was made in the proceedings for an order for payment of the petitioner's costs *de die in diem*. An answer was filed on the 15th May, 1909, and efforts at a settlement out of Court having been made, it was agreed to enter into a separation deed, and the terms of the deed (if differences arose about them) and all incidental matters in controversy were to be left to the arbitration of the present Attorney-General (then Mr. C. A. O'Connor, K.C.). The award, subsequently made, provided *inter alia* that the respondent was to indemnify the petitioner against the costs of the divorce proceedings, estimated at £60; and certain chattels, furniture, &c., the value of which was not specified, were declared to be the petitioner's separate property. The respondent, however, refused to execute a deed drawn in pursuance of the award. While a correspondence was in progress between the solicitors for the respective parties, on, as applicants alleged, the petitioner's instructions, they received a letter from their client, dated the 8th September, 1909, stating that she was reconciled to her husband, was cohabiting with him, and that the award and deed might be torn up. Thereupon Messrs. O'Keeffe and Lynch served the petitioner with the bill of costs, brought an action for them against her and obtained judgment for the amount of the bill, £118 4*s*. 3*d*., on the 11th January, 1910. A writ of *fi. fa.* was issued, but a return was made of *nulla bona*, the furniture mentioned in the award, which was the only property available for seizure under the writ, being claimed by the respondent, and nothing was realized on foot of the judgment. Further and more amplified details of the case will be found in the judgment of Madden, J.

The Right Hon. J. H. Campbell, K.C., and *The Hon. Cecil Atkinson*, for the applicants, Messrs. O'Keeffe and Lynch.

Serjeant Moriarty, K.C., and *P. A. O'C. White*, for the respondent.

K. B. Div. 1910.

SULLIVAN v. SULLIVAN.

The counsel for the applicants having intimated that they could not rely on fraud on the part of the respondent, which was not proved by any of the affidavits filed on behalf of their clients, was proceeding to argue the case on the general and established practice of the Court in such cases to protect a solicitor from losing his costs properly incurred on behalf of one of the parties to a properly constituted action (especially in the case of a wife suing for a divorce) by reason of any compromise, when the learned Judge suggested that what the respondent came prepared to meet was a charge of fraud, and that, when this charge was abandoned, it would be only fair to give him an opportunity of offering further evidence if so advised. Accordingly, the hearing of the motion was adjourned; and further affidavits were filed, the substance and effect of which are stated by Mr. Justice Madden.

1911.
May 15.

MADDEN, J.:—

This is an application on behalf of Messrs. O'Keeffe and Lynch, the solicitors for the petitioner, that the respondent should be ordered to pay to them the sum of £110 9*s.* 9*d.*, as the costs incurred by them on behalf of the petitioner in prosecuting the proceeding in this matter. The petition, which prayed for a divorce *a mensa et thoro*, was filed on the 3rd of March, 1909. Before and after the filing of the petition efforts were made by the petitioner's solicitors to bring about an amicable settlement of the case. They had no immediate result; and on the 19th of April, 1909, a summons to fix the time and mode of trial was issued on the part of the petitioner. A notice of motion for alimony *pendente lite* was served for the 3rd of May, but no application was made for the usual order for taxation and payment of the petitioner's costs. An answer was filed on the 15th of May. Further negotiations, into the details of which I need not enter, resulted in the signature of a consent on the 24th of May, 1909, by which the parties mutually agreed to enter into a deed of separation, the terms of which were to be settled by arbitration, the present Solicitor-General having been appointed as arbitrator.

The submission deals in detail with a number of matters relating to the custody and education of the children of the marriage, and contains the following clause:—"All existing liabilities of a joint and several nature of the said parties to be finally adjusted between them according to their legal rights." A deed of separation was to be executed, the terms of which were to be settled by the arbitrator, except in so far as they were defined by the specific provisions of his award. The arbitrator made his award on the 29th of July, 1909. It contains carefully prepared provisions relating to the custody and education of the children of the marriage. The provisions of the award dealing with questions of property are substantially as follows:—The petitioner was to support and maintain herself out of her separate estate. The respondent was to indemnify the petitioner against certain debts and liabilities, including a liability to the Hibernian Bank, on a bill or promissory note for £200, a debt of £25, and the accounts mentioned in the first schedule to the award. The last item in this schedule is "costs of present litigation, £60." The petitioner was to indemnify the respondent against liability on foot of specified debts in which they were both liable, amounting to £72. The several articles enumerated in the second schedule were declared to be the separate property of the petitioner. The value of these articles is not stated, but I observe that in addition to those which are specified, the schedule includes all other articles sent to Wallis by the respondent, in respect of which the storage fees are to be paid by the respondent. The petitioner and the respondent were to abide their own costs of the submission and reference, and each was to pay one moiety of the arbitration fees and of the preparation and execution of the deed of separation.

A deed of separation, carrying out the terms of this award, was prepared, but the respondent refused to sign it. Mr. Stevenson states in his affidavit, filed for the purpose of the present motion: "The petitioner instructed my firm to press for the execution of the deed, and the closing of the accounts between herself and the respondent in pursuance of the terms of the award." A correspondence took place between the solicitors, in which the petitioner's solicitors threatened legal proceedings, "to compel the performance of the agreement if he did not execute the deed." While this

K. B. Div. 1911.

SULLIVAN v. SULLIVAN.

Madden, J.

correspondence was in progress, the petitioner wrote to her solicitors a letter, dated the 8th of September, 1909, in the following terms:—

"DEAR SIRS—As my husband and I have settled all disputes and resumed cohabitation, you need not take any further steps in the matter. Therefore you may assume that the award and deed may be torn up.

"Yours faithfully,

"A. C. SULLIVAN."

No application was made to this Court in relation to the costs incurred on behalf of the petitioner, until the 10th of November, 1910, when notice was served of the present motion. The application was founded on an alleged fraudulent arrangement whereby the respondent induced the petitioner to return to cohabitation with him solely for the purpose, and with the intention, of endeavouring to defeat the claim and payment by the respondent of the said costs so incurred by Messrs. O'Keeffe and Lynch, on behalf of the petitioner, and for the purpose of fraudulently evading the payment of such costs. The relief asked for was an order for the payment of the costs, or, in the alternative that the solicitors might be at liberty to carry on the proceedings in the matter of the petition, for the purpose of recovering the costs which they claimed. This was an attempt to bring the case within the authority of the decision of the Court of Appeal, in *Dunthorne* v. *Bunbury* (1). That was an action at Common Law, to which the second alternative proposed by the notice of motion would certainly be more appropriate than to a petition for a divorce *a mensa et thoro*. The evidence when this case came before me originally dealt mainly with this alleged fraudulent contrivance; of fraudulent intention there was not a particle of evidence, and Mr. Campbell, realizing that the applicants had taken upon themselves an unnecessary burden of proof, based his application on the recognized position of a wife who is a litigant in this Court, and the right of a solicitor, who had acted for her in good faith, to have his costs provided for, where the parties have brought the litigation to a

(1) 24 L. R. I. 6.

close by entering into a settlement without his knowledge. In such a case, the mere fact of such a settlement is sufficient, without regard to the intention of the parties. This principle was acted on by my predecessor, in *Ballance* v. *Ballance* (1) and *O'Neill* v. *O'Neill* (2). In the latter case Mr. Justice Andrews said: "The fact that the arrangement deprives the wife's solicitor of his costs is enough. Everyone must be presumed to intend the obvious result of his own action. I am not going to try the question whether the arrangement was in fact collusive." By the costs of the wife's solicitor I understand the costs to which, when the arrangement was entered into, her solicitor was entitled according to the law and practice of this Court. The fact of the arrangement can give him no higher right than this. The cases to which I have referred are applicable to the present case; and if the applicants were entitled to obtain from the respondent her costs of the proceedings when the letter of 8th September, 1909, was written, this right is still subsisting and ought to be enforced. Whether they were so entitled is the question for decision upon the present motion, as it is now presented.

When Mr. Campbell presented his application in the modified form, abandoning the charge of actual fraud, I was prepared to deal with the case as presented on the authority of the cases to which he referred, acting on the rule now in force in Equity, by which failure to prove actual fraud, where there is a right to relief on other grounds, is treated as a matter to be dealt with in determining how the costs of the application should be borne. But, in reading the papers in the case, I saw that the respondent had been placed at a disadvantage by the form in which the application had been framed. He came to meet a charge of actual fraud, and had met it successfully. But on the view of the law presented by Mr. Campbell, which I am prepared to adopt, the question for my decision was a different one. The right of the wife's solicitors to costs where the proceedings have been brought to a close by arrangement, and where no provision has been made for securing the payment of those costs, is not an absolute right, but one depending on the circumstances of the particular case, and I thought it right to afford to both parties an

(1) [1899] 2 I. R. 128. (2) 42 I. L. T. R. 281.

K. B. Div. 1911.

SULLIVAN v. SULLIVAN.

Madden, J.

opportunity of bringing these facts before me, in the altered position of affairs. Additional affidavits were filed, on which the case was re-argued, and I am now in a position to consider it in view of the entire course of the litigation.

The legal principles applicable to this case are well settled. A wife, a litigant in this Court, is entitled as of right, unless it is shown that she has adequate separate estate, to have her costs provided for by her husband. The order to which she is entitled directs the husband to pay her costs already incurred when taxed, refers her future costs for taxation *de die in diem*, and provides for a security to be given by the husband for the costs of the suit. The ground of this exceptional treatment of the wife is thus stated by Lord Hannen: "In the vast majority of cases the wife has no means of her own. She has to find an attorney to take up her case for her, and if she could not obtain from her husband the means of employing him, she would be powerless; and, however good a cause she might have had for taking proceedings, she would be unable to enforce her rights": *Flower* v. *Flower* (1). This is the principle upon which the wife's costs are dealt with in this Court, as interpreted in a series of cases of which the most recent are: *Kemp-Welch* v. *Kemp-Welch* (2) and *Sanders* v. *Sanders* (3).

The same principle is the foundation of the common law right of the wife's attorney to sue the husband for costs so incurred on her behalf as necessaries, a right which is not limited to the rights and remedies for the recovery of a wife's costs afforded in this Court: *Ottoway* v. *Hamilton* (4).

Although the rule in this Court and at common law had its origin in the consideration that without its application a wife, without separate estate, could not have the means of securing legal assistance, it has been extended so as to apply to the remuneration of a solicitor whose services the wife had already obtained, and who had acted for her without obtaining the protection of the order for taxation *de die in diem*, and security for costs against the husband to which I have referred. It was at

(1) L. R. 3 P. & M. 132.
(2) [1910] P. 233.
(3) [1911] P. 101.
(4) 3 C. P. D. 393.

one time held in the Ecclesiastical Court that the wife lost her remedy for costs if this order had not been obtained: *Keats* v. *Keats* (1). But this is not now the law. In *Cooper* v. *Cooper* (2) no such order for payment of the wife's costs had been obtained. The petitioner returned to cohabitation with her husband, who applied that the petition should be dismissed. The Judge pointed out that if the wife had, in accordance with the usual practice, applied as the suit went on to have her costs *de die in diem*, she would certainly have had them. "Therefore, if I am to refuse the application simply because she had omitted to comply with that practice, the result would be that the extreme system of taxation *de die in diem* must be adopted in all cases, or otherwise the wife's attorney would be in peril as to her costs. Unnecessary taxation is always to be deprecated."

I have already referred to the decision of Lord Hannen in *Flower* v. *Flower* (3) for a clear statement of the principle upon which the exceptional treatment of the wife is based. In that case no order for taxation *de die in diem* had been obtained. The Judge held that the application was not one of absolute right, but was one which ought to be granted in the absence of strong reasons to the contrary. The consideration suggested by the Judge as sufficient to justify him in refusing such an application related to the action of the solicitor in the institution or progress of the suit. He would be justified in refusing the costs "when it appeared that the attorney had done something wrong, or that he had instituted proceedings without reasonable ground, that is where he had the means of seeing before instituting the suit that it was one which ought not to be instituted." Neither of these considerations applies to the present case. But the judgment of Sir James Hannen is founded on the principle that the wife's solicitor may be disentitled to costs by reason of his action in the course of the litigation. Applying these principles, I am clearly of opinion that the Judge, in dealing with an application like the present one, would be not only justified in refusing the costs, but bound to do so if it should appear that the

(1) 28 Law Jur. (N. S.) Prob. 57.
(2) 3 Sw. & Tr. 392.
(3) L. R. 3 P. & M. 132.

K. B. Div. 1911. SULLIVAN v. SULLIVAN. Madden, J.

solicitor in the institution of the suit, and in conducting it, had looked for payment of his costs, not to the husband, but to the separate estate of the wife. And it is on this ground that the respondent disputes his liability to costs in the present case.

From the evidence now before us, it appears that the petitioner, when the suit was instituted, was entitled under the will of her father to the interest on a sum of £10,000, which produced an annual income of about £330. This income was subject to a restraint on anticipation, and the presumption that a married woman possessed of separate estate contracts with reference to her separate estate is rebutted when she is restrained from anticipation : *Harrison* v. *Harrison* (1). In this case the woman had no separate estate other than that which was bound by the restraint on anticipation, and there were no facts in evidence which could be relied on in support of the legal presumption. In both these respects it differs from the case with which I have to deal. In the present instance there is evidence of the existence of unfettered separate property within the control of the petitioner, and there is also evidence that the solicitors had knowledge of the existence of this separate estate, and that they dealt with her as capable of contracting with reference to it. It appears from the affidavit of the respondent that when she consulted her solicitors she had in hands the sum of £40. They may not have known of this fact, but they were aware of the provisions with regard to her separate estate contained in the arbitrator's award. This award was repudiated by the respondent, but it was adopted by the petitioner's solicitors, who threatened proceedings against the respondent for the purpose of enforcing it. Under this award the respondent is bound to indemnify the petitioner against liability on certain contracts which she must be supposed to have entered into with regard to her separate estate. One of these is a bill or note for £200. Another is the costs of the proceedings in this Court, the liability in respect of which is the foundation of the indemnity. The value of the scheduled articles which are admitted to be her separate estate, including the furniture stored at Messrs. Wallis, may well have been sufficient to meet the costs

(1) 13 P. D. 180.

of these proceedings. When the proceedings were brought to an end by the letter of the 8th September, 1909, instead of applying to this Court on the authority of the cases on which they now rely, they served the petitioner with a bill of costs under the statute, issued a writ against her, and obtained judgment on the 11th of June, 1910. I have before me a copy of an affidavit sworn by a member of the firm in this action, in which he swears that "the sum of £118 4*s.* 3*d.*, being the sum for which the plaintiffs seek judgment, is now actually due by the plaintiff over and above all just and fair allowances." A writ of *fi. fa.* was issued on foot of the judgment, on which there was a return of *nulla bona*. An order was subsequently obtained for the attendance of the defendant for examination as to her separate estate, which appears to have been adjourned in consequence of the ill-health of the defendant. I was satisfied from the action of the petitioner's solicitors throughout the proceedings in this Court, and after their close, that they looked to her separate estate as the security for her costs, and I hold that by so doing they have disentitled themselves to the relief which they now claim. The motion must be refused with costs. W. L.

Appeal. June 13.

Messrs. O'Keeffe and Lynch appealed to the Court of Appeal (1).

The Right Hon. J. H. Campbell, K.C., and *H. Wilson, K.C.* (with them, *The Hon. Cecil Atkinson*), for the appellants:—

It is *ex debito justitiæ* that the solicitor for a wife petitioning for a divorce should be paid her costs by the husband: *Cooper* v. *Cooper* (2); *Ballance* v. *Ballance* (3); *O'Neill* v. *O'Neill* (4). In the last-mentioned case Andrews, J., says, in giving judgment, p. 282: "If he" (the wife's solicitor) "has *bona fide* conducted a proceeding proper to be conducted on behalf of the wife, then he

(1) Before Sir S. WALKER, BART., C., and LORDS JUSTICES HOLMES and CHERRY.

(2) 3 Sw. & Tr. 392.
(3) [1899] 2 Ir. R. 128.
(4) 42 Ir. L. T. R. 281.

Appeal. 1911.

SULLIVAN v. SULLIVAN.

ought not to be deprived of his costs merely because his client has gone over to the husband."

There is nothing here to show that the wife had any separate estate which could be made available. It must be presumed that she did not contract to pledge property which she was restrained from anticipating: *Harrison* v. *Harrison* (1). The chattel property awarded to her was claimed by the respondent. Under the award he was expressly made liable, to some extent at least, for these costs. The judgment obtained against the wife has been entirely fruitless.

[They also cited: *Turner* v. *Rookes* (2); *Stocken* v. *Pattrick* (3); *Rice* v. *Shepherd* (4); *Ottaway* v. *Hamilton* (5); *Flower* v. *Flower* (6); *Ash* v. *Ash* (7); *Paquin* v. *Beauclerk* (8).]

Serjeant Moriarty, K.C., and *P. A. O'C. White*, for the respondent:—

The judgment obtained by O'Keeffe and Lynch against the wife is a complete answer to the present claim. She was sued as agent of her husband: *Priestly* v. *Fernie* (9), where the general principle was considered by Bramwell, B., to admit of no doubt that where an agent has been sued to judgment no second action can be brought against the principal. The same is laid down by Lord Cairns in *Kendall* v. *Hamilton* (10); see also *Morell* v. *Westmorland* (11); *French* v. *Howie* (12).

H. Wilson, K.C., in reply, cited *Beck* v. *Pierce* (13); *O'Neill* v. *O'Neill* (14).

(1) 13 P. D. 180.
(2) 10 A. & E. 47.
(3) 29 L. T. (N. S.) 507.
(4) 12 C. B. (N. S.) 332.
(5) 3 C. P. D. 393.
(6) L. R. 3 P. & M. 132.
(7) [1893] P. 222.
(8) [1906] A. C. 148.
(9) 3 H. & C. 977.
(10) 4 App. Cas. 504, at p. 514.
(11) [1904] A. C. 11.
(12) [1906] 2 K. B. 679.
(13) 23 Q. B. D. 311.
(14) 42 Ir. L. T. R. 281.

THE LORD CHANCELLOR (1):—

The appellants' counsel is in a difficult position, because he can give no answer to the point put by Serjeant Moriarty on the cases cited by him, showing that where there is a claim against a husband and wife, and proceedings are instituted against the wife, she having contracted as agent for the husband, and the party taking such proceedings obtains judgment against her—which is equivalent to payment—such a judgment is a bar to subsequent proceedings on the same contract against her husband, the principal. How can the husband be proceeded against when the foundation of the liability is gone? I do not see how liability can be enforced against him. It is as if he had paid O'Keeffe and Lynch. The argument that he is bound to answer for his wife's necessaries also fails under these circumstances. We must affirm the decision of Madden, J., but not on the ground which was first presented. We are all of opinion that no costs should be given to Mr. Sullivan, either here or in the Court below. In the award made by the Solicitor-General, Mr. O'Connor, K.C., it is admitted that the respondent was bound to pay £60 for these very costs. Yet when the bailiffs came to his house at Rathkeale, he made a declaration that chattels which in the schedule to the award were declared to be his wife's separate property were his. Therefore we give him no costs here or below.

HOLMES, L.J.:—

The ground of liability alleged against the respondent is, that his wife in employing Messrs. O'Keeffe and Lynch as her solicitors, in seeking a divorce *a mensa et thoro*, was acting as the agent of her husband. If the application to Madden, J., by the solicitors for an order against the husband to pay the costs had been the only proceeding taken for their recovery, the result might have been different. But, unfortunately, the solicitors had previously brought an action against the wife for the same costs, treating her as principal, in which action they obtained judgment

(1) SIR S. WALKER, BART.

Appeal. 1911. SULLIVAN *v.* SULLIVAN. Holmes, L.J.

against her. It is clearly settled by *Priestly* v. *Fernie* (1), approved in *Kendall* v. *Hamilton* (2), that after obtaining judgment against an agent, the creditor cannot sue the principal on foot of the demand for which he has recovered the judgment, though the judgment is unproductive. I am therefore obliged to hold—and I do so with regret—that the appeal must be dismissed. I agree that the respondent should not get costs either in the Divisional Court or here, for the reasons stated by the Lord Chancellor.

CHERRY, L.J. :—

I agree; *Priestly* v. *Fernie* (1) is absolutely in point. That case was cited with approval by Lord Cairns in *Kendall* v. *Hamilton* (2). No answer has been given or could be given to the argument presented to us by Serjeant Moriarty. We are bound by the authorities on which he relied.

Solicitors for Messrs. O'Keeffe and Lynch: *Baker, Ringwood, and Gordon*

Solicitors for Mr. Sullivan: *V. B. Dillon & Co.*

W. G.

(1) 3 H. & C. 977. (2) 4 App. Cas. 504.

MEIER, APPLICANT; LORD MAYOR, ALDERMEN, AND BURGESSES OF DUBLIN, RESPONDENTS (1).

Appeal.
1912.
Jan. 25, 29.

Workmen's Compensation Act, 1906, *sect.* 4—*Principal and contractor—Obligation on applicant to elect which is sought to be made liable for compensation—Award against one, though partly fruitless, a bar to proceedings under the Act against the other—Notice of accident—Claim—Delay beyond prescribed period—Excuse.*

An applicant who seeks to avail of the provisions of section 4 of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 50), must elect whether he will proceed against the contractor or the principal, their statutory liability for compensation in cases of accident being alternative, and neither joint nor joint and several. Accordingly, where a workman obtained an award against the contractor who employed him, but in consequence of the bankruptcy of the contractor and liquidation of the Insuring Company, was unable to realize more than a small portion of the amount awarded.

Held, affirming the decision of the Recorder of Dublin (The Right Hon. Thomas L. O'Shaughnessy, K.C.), that he could not subsequently recover the balance of the award from the principal.

Herd v. *Summers*, 7 Fraser (5th series) 870, followed.

Held, further, that failure to serve notice of accident and claim on the principal within the prescribed time was also an answer to any claim against the principal.

APPEAL by the applicant, John Meier, from the order of the Right Hon. the Recorder of Dublin, dated the 14th December, 1911, dismissing his claim for compensation against the Corporation of Dublin.

Applicant, while in the employment of Moran & Son, contractors under the Corporation of Dublin, in connexion with the Main Drainage Works of the city, on the 19th December, 1910, met with a severe accident, resulting in the loss of his left eye and injuries to the spine, rendering him totally incapacitated. It was admitted that the accident occurred out of and in the course of his employment. He commenced proceedings under the Workmen's Compensation Act against Moran & Son, and on the

(1) Before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

Appeal. 1912.

MEIER v. CORPORATION OF DUBLIN.

5th May, 1911, the Recorder awarded him 12*s.* 3*d.* weekly from the 21st March. Moran & Son were in liquidation, and their insurers, the Law Car Co., also went into liquidation. The award of the 5th May, 1911, having thus become fruitless, applicant on the 31st October, 1911, served a claim on the Corporation of Dublin, and filed an application on the 17th Nov., 1911. The Corporation by their answer relied on want of notice of the accident, and the lateness of the claim. They served third party notices on Moran & Son, the liquidator of the Law Car Co., and the Fidelity Deposit Co., Limited, of Maryland, who had guaranteed Moran and Co.'s performance of their contract with the Corporation.

The learned Recorder held that the applicant had elected and obtained an award against his employers, and could not, in the circumstances, obtain a second award. He also found in fact that there was no notice and no claim within the proper time.

Gleeson, for the applicant:—

The Dublin Corporation were principals within the meaning of section 4 of the Workmen's Compensation Act, 1906, and are liable in default of the employer. The Corporation, however, contend that as the applicant proceeded against the contractor, obtained an award against him, and received some payments on foot of the award, he is debarred from holding the Corporation liable for the deficiency in the full satisfaction of his claim. We contend that this is not so, but that under the section both principal and contractor are liable until the claim is fully satisfied. The question as to joint liability was raised in *Mulrooney* v. *Todd and the Corporation of Bradford* (1). In that case the Court of Appeal decided against the Corporation of Bradford on the facts, but expressly pointed out that they refrained from any decision as to whether both the parties were properly joined; see *per* Cozens-Hardy, M.R., pp. 168, 169. It is quite clear that by proceeding against the contractor under the Workmen's Compensation Act, the claimant did not forfeit the right to bring an action against anyone else who might be

(1) [1909] 1 K. B. 165; 2 Butterworth, 199.

liable if the award under the Act was wholly or in part fruitless. This necessarily follows from the decision of the majority of this Court affirming the judgment of the King's Bench Division in *Beckley* v. *Scott* (1), see *per* FitzGibbon, L.J., at p. 522; *Oliver* v. *Nautilus Steam Shipping Co.* (2), see *per* Romer, L.J., at page 651. The real object of section 6 (1) was to prevent double payment for the same thing, but until satisfaction the principal was put in the place of the contractor. In *Cribb* v. *Kynochs, Limited* (3), it was held that when a worker brings an action at Common Law against the employer and fails, compensation under the Workmen's Compensation Act, 1897, could not be claimed except by the procedure indicated in section 1, sub-section (4). The difference between the Acts of 1897 and 1906 is illustrated by the judgments of the same Court in the subsequent case of *Page* v. *Burtwell* (4), reported in the same volume, p. 758. Farwell, L.J., at p. 763: "The new Act gives the workman a right both to take proceedings and to claim compensation, or to carry on both, subject to the qualification that he shall not be entitled to recover both damages and compensation." Where the liability is joint and several an unsatisfied judgment against one of the persons liable is no defence to the other: *King* v. *Hoare* (5); *Kendall* v. *Hamilton* (6), see *per* Lord O'Hagan, at p. 535.

P. A. O'C. White, for the Corporation of Dublin:—

Section 2 of the Act of 1906 enacts that no proceedings to recover compensation thereunder shall be taken unless notice of the accident has been given as soon after the happening thereof as practicable, and unless the claim be made within six months of its occurrence, with certain exceptions, *inter alia* (*a*), if it is found in the proceedings for settling the claim, *i.e.*, by the arbitrator (here the Recorder), that the employer is not or would not be prejudiced by such default in giving the prescribed notice.

Sub-section (3) of section 4, providing that nothing in the section is to prevent the workman from recovering compensation under the Act from the contractor instead of the principal,

(1) [1902] 2 I. R. 504, 518.
(2) [1903] 2 K. B. 639.
(3) [1908] 2 K. B. 551.
(4) [1908] 2 K. B. 758.
(5) 13 M. & W. 494.
(6) 4 App. Cas. 504.

Appeal. 1912.

MEIER v. CORPORATION OF DUBLIN.

indicates that, without such a saving, it might have been held that the principal alone was liable under the section. But it is plain on the whole legislation that the workman must elect whom he would proceed against; and after election to hold the contractor liable he loses his remedy against the principal.

T. Sullivan, for the liquidator of Moran & Company, stated that in the winding-up there might be a small surplus, but that the amount was uncertain.

Moore, for the Fidelity and Deposit Co., Limited, of Maryland:—

In *Baird* v. *Higginbotham* (1) (Ruegg's Employers' Liability, p. 490, 8th ed.), the widow of the deceased workman first brought an action at common law for his death, which was dismissed in November, 1900. A claim made by her in February, 1901, for compensation under the Workmen's Compensation Act, was dismissed by the Scotch Court of Session as being too late. *Herd* v. *Summers* (2), cited in Ruegg, p. 600, is a positive authority that an election must be made, and once made is conclusive.

[Counsel cited several extracts from this case, which will be found fully stated in the judgment of the Lord Chancellor, *infra*. Counsel also referred to *Oliver* v. *Nautilus Steam Shipping Co.* (3), and read passages from the judgment of Romer, L.J.]

Gleeson, in reply:—

There is no reason to believe that the Corporation were prejudiced by omission to serve the notice in time. The accident and its serious nature were beyond controversy, and the position of the principal could not have been bettered by an early medical examination. But if they were prejudiced, that would not defeat the claim if there was a sufficient excuse such as existed here: *Eke* v. *Hart-Dyke* (4). The principal stands in the place of the contractor, and is bound by notice to the contractor. If the applicant obtains an award against the principal, it takes, under section 4, the place of the earlier and unproductive award against the contractor, which disappears altogether.

(1) 3 F. 673; 38 Sc. L. R. 479.
(2) 7 F. 870; 42 Sc. L. R. 665.
(3) [1903] 2 K. B. 639.
(4) [1910] 2 K. B. 677.

Appeal.
1912.

MEIER
v.
CORPORATION OF DUBLIN.

Jan. 29.

THE LORD CHANCELLOR:—

The accident in this case happened on December 19th, 1910. It was a lamentable occurrence, and the plaintiff has, in the circumstances, been placed in a position deserving of much sympathy. He was at the time engaged in working for a contractor named Moran, who was executing a contract for the Dublin Corporation, and as the result of heavy stones falling upon him he has lost the sight of one eye, and has been otherwise bodily so injured that he is considered to be permanently incapacitated. In a claim brought by Meier against his employer, Moran, under the Workmen's Compensation Act, 1906, he obtained an award, under which he was entitled to the payment of 12*s.* 3*d.* weekly, by way of compensation under the Act. A few payments were made to Meier under the award, but financial difficulties have overtaken Moran, and even the society by which he was insured, and the result is that the award made in Meier's favour has become valueless, and there is but little if any hope that further payments will be made on foot of it. Nothing has, in fact, been paid since March 21st, 1911, and it is impossible to think without pity of the miserable plight in which the man has been placed. After fruitless efforts to obtain further payments from Moran, Meier brought a claim in October, 1911, against the Corporation under section 4 of the Act of 1906. Objection has been raised to the claim on the part of the Corporation by reason of the omission to serve upon them a notice of the accident, and the late date beyond the statutory limit at which the claim was made against them. I cannot but regard the objection as a great, if not insuperable, difficulty in the way of the claim; and I do not speculate as to how far the Corporation would be disposed to insist upon them, if there were were not another question of general interest and importance involved. It is maintained by the Corporation that Meier having brought a claim under the Act against his direct employer, and obtained an award in his favour, has exhausted his rights under the Act of 1906, and that it is, therefore, incompetent for him to present the present application against the Corporation, apart altogether from any irregularity of procedure. That was the important question discussed before the Recorder, and upon it the Recorder decided

Appeal. 1912. — MEIER v. CORPORATION OF DUBLIN. — The Lord Chancellor.

that, in his opinion, owing to the previous proceedings against Moran, the claim could not, under any circumstances, be maintained against the Corporation under section 4, the sub-contracting clause as it is called. Obviously, that is a question under the Act of 1906 of general importance. It has not been, so far as we know, the subject previously of actual decision, and it is to it that I propose to apply myself in the course of what I am now about to say. The Workmen's Compensation Act, 1897, for the purpose of the particular question decided, was in all substance to the same effect as the Act of 1906. Section 4 of the Act of 1897 exactly corresponds in the matter with section 4 of the Act of 1906, under which this claim has been brought against the Corporation as "principal" within the meaning of the section. Everyone knows the general nature of the section, but I have carefully compared the two Acts and the terms of the sub-contracting sections in both of them, and an examination will at once show their substantial identity. There is, in regard to the present question, one difference between them, and that is that there is not in the Act of 1897 any provision equivalent to sub-section (3) of section 4 in the Act of 1896. At present I desire merely to note the fact; but I think the circumstance only adds confirmation to the view which, after full consideration, I find it necessary to take of the Act. It is a remarkable fact to be noted, that neither under the Act of 1897 nor under the Act of 1906 could a case be produced deciding that it was possible to sue the employer and the undertaker or principal within sections 4 of the Acts of 1897 and 1906 respectively. If the opinion were entertained by the profession that a joint liability or a joint and several liability existed against the contractor and the undertaker or principal according to the phraseology of the respective Acts, it is impossible not to believe that in the years that have elapsed since 1897 numerous cases based on that interpretation would have been decided in the Courts. A close search was made in that respect by the learned counsel in the appeal, and only two cases could be found at all bearing on the point. The case of *Mulrooney* v. *Todd* (1) was relied on by Mr. Gleeson on the part of the appellant, as an authority in his

(1) [1899] 1 K. B. 165.

favour, but I do not think the decision is to be so regarded. It was a case in which both the contractor and the "principal" were made defendants in a claim for compensation by an injured workman under the Act of 1906. No doubt an award was made by the County Court Judge against both, but on appeal the point now involved was not put forward on behalf of the Corporation, which was the "principal," and in delivering judgment the Master of the Rolls, at pp. 168-9, said distinctly—"This case must not be referred to as either holding or denying that both these parties were properly made parties. That point has not been raised and will not be covered by our decision." It is impossible to treat the case as in any degree an authority against the Recorder's view; indeed the caution of the learned Judge in the matter throws doubt at once on the proposition underlying the appeal. I pass to the other case referred to by Mr. Moore in his argument, that of *Herd* v. *Summers* (1), a decision of the First Division Court in Scotland, on June 28th, 1905. I have had the opportunity of examining the report since the argument in the Courts, and it appears to me that it is a clear authority in support of the Recorder's decision, to the effect that Meier having got his award against Moran was not authorized to make a second claim against the Corporation under section 4 of the Act. *Herd* v. *Summers* (2) was, of course, a claim under the statute of 1897. Its full title was Mrs. Sarah Jane Lennon, or Herd, and Others, claimants, against James Summers and R. and W. Cuthbertson, respondents. Mrs. Herd was the widow of a workman who was killed by an accident that befell him while working under his employer, the respondent, James Summers, who at the time was carrying out a contract for the other respondents, R. and W. Cuthbertson. The claim for compensation was made in the same proceeding against the two respondents, one as the employer and the other as the undertakers, under section 4 of the Act of 1897; and the claim asked that compensation should be awarded against the contractors and the other defendants "jointly and severally, or severally in such proportions between them as the Court should think just."

The case first came before the sheriff substitute, and he

(1) 7 Fraser, 870 (Sessions Cases).

Appeal. 1912.

MEIER v. CORPORATION OF DUBLIN.

The Lord Chancellor.

dismissed the application as incompetent, on the ground that "a party seeking compensation under the said Act must ask it from an undertaker. The applicant must, before coming into Court, elect his undertaker." I quote the words as they appear in the report, but it is obvious that the sheriff substitute used the words "undertakers" and "undertaker" as including the direct employer of the workman. Section 1 of the Act of 1897 puts the liability on the employer, as in the Act of 1906, and section 4 gives authority to sue the undertaker, as in section 4 of the Act of 1906 authority is given to the "principal"—undertaker is defined in section 13 of the Act—but the respondents were in the same relation precisely to one another as Moran and the Corporation in the present case. An appeal was taken from the sheriff substitute's decision, and the question of law considered was, whether the application in its form was competent. It was argued for the appellants that a joint and several liability on the part of both undertakers was contemplated by the Act. James Summers, the contractor, was not represented, but for the Cuthbertsons, who stood in the position of the Corporation there, it was urged that there was no joint and several liability contemplated by section 4, and that the sheriff substitute was right in holding that the claimants must select against whom they were to make a claim. The contention that the work in which the accident happened was not connected with their business was also put forward; but that does not relate to the present case. Four learned Judges gave judgment, the first being the Lord President, who, from that date, must have been Lord Dunedin. In dealing with the question which now concerns us, the Lord President said: "Although there is provision in section 4 dealing with sub-contracting, there is no provision in that Act for joint and several liability. That being so, I would have no hesitation in saying that the sheriff substitute was right except for the consideration which, at one time, I thought might affect the matter—that as this was a summary procedure, by way of arbitration, it might be allowed to proceed against one of the respondents, although it was clear on the face of the pleadings that the applicant had no case against the other respondent. I am satisfied, however, that the sheriff substitute was right. It would

be *mala praxis* to have persons convened in Court leaving it to to the Court to determine against which of them a good action lay. A party must determine against whom he has a remedy before he brings his case into Court." Lord Adam, following, said: "The primary purpose of the Act is to make the employer liable to pay compensation to the workman or to his dependants. There is only one case, so far as I know, where a workman has a claim against anybody else than his direct employer. That is the case under section 4. The effect of that section appears to me to be that when, in an employment to which the Act applies, the undertakers as defined by the Act contract for the execution of any work, and an accident occurs in the execution of the work which gives the workman a claim to compensation against his employers, it also gives him a claim against the undertakers, as if he had been immediately employed by them. It, however, in no way interferes with his claim against his direct employer. It only gives him a right to claim his compensation from a second party, if he so pleases. I see nothing accordingly in the section, nor indeed, in any part of the Act, which can give rise to a claim of joint or several liability, and as regards several liability, it is clear to me that the workman cannot get decree for the same compensation both against his direct employers and against the undertakers. I think he must elect to proceed against one or other. It is true that if he elects to proceed against the undertakers, they may have relief against the employer; but that is a matter with which the workman has no concern. The Act has put the undertakers in the same position as regards the workman as if they had been his direct employers, and I think the sheriff was right in holding that the workman is bound to elect whether he will seek to recover compensation due to him from them or from his employer."

Lord M'Laren says: "For I am of opinion that there can be no case of joint and several liability under the Workmen's Compensation Act. On careful reading of section 4, I think that when a workman proceeds against the undertakers, in the sense of the Act, instead of proceeding against his own employer, it results that the undertaker shall have relief against the other party liable. Now, if the workman was allowed to proceed against both parties,

Appeal. 1912. MEIER v. CORPORATION OF DUBLIN. The Lord Chancellor.

and to get a decree against both, what becomes of the right to relief?" He adds, "While I think that if this were an ordinary action concluding against two defenders jointly and severally, or severally, there might be ground for separating the claim, it appears to me that in the present case such a proceeding would be at variance with a fundamental principle of the Acts—that a workman must proceed either against the undertaker or against his own employer, but not against both." Lord Kinnear agreed that there was no joint and several liability contemplated by the Act, and that apart from the provision as to sub-contracting, with which they were not concerned at present, the only person liable is the employer, who is the employer in the sense of the Act.

I have read these several passages from the unanimous judgment of the four learned Judges, because, as I understand, the report is not obtainable in the law library, and the quotations I have made appear to me to bear directly on the important question for decision in this case. It is needless to make any elaborate application of them to the Act of 1906. I agree with them in themselves. Their application is evident, and, in my opinion, decisive. They deal with an Act which, in relation to the particular question before us, is practically on all fours with the Act of 1906. Such difference as there is only enhances the force of *Herd* v. *Summers* (1) in the construction of the Act of 1906. Sub-section 3 of section 4 makes it plain that there must be an election by the workman between the employer and the principal. While realizing the words used being as to "recovering compensation," I cannot but think that the sub-section clearly implies that if an award be obtained under the Act by an injured workman against his employer, as here—or indeed if the proceedings are otherwise brought to a final conclusion—the liability of the "principal" under section 4 becomes thereby suspended and determined. In the same way, in my opinion, in the case of a claim made against a principal where section 4 was applicable, the correlative result under the like conditions would follow for the direct employer, and he would be exonerated from any further demand on the part of the workman.

I have accordingly come to the conclusion that the Recorder's

(1) 7 Fraser 870 (Sessions Cases).

decision was right. The application against the Corporation was not competent in the circumstance, and the appeal must be dismissed.

HOLMES, L.J.:—

This appeal raises an important legal question on the construction of section 4 of the Workmen's Compensation Act, 1906, which, as far as I am aware, has not hitherto been decided. John Meier was in the employment of Messrs. Moran & Son while they were engaged in carrying out a contract which they had entered into with the Corporation of Dublin for works connected with the main drainage of the city. John Meier, on the 19th December, 1910, was totally incapacitated for work by an accident met with in the course of and arising out of his employment under Moran & Son in carrying out their contract, whereupon he served notice of the accident on the firm. The result was that he was regularly paid by them the full weekly sum to which he was entitled under the statute down to the 21st March, 1911, when the payment ceased. He then made a claim on them for compensation, on which an award was duly made on the 5th May, 1911, of 12*s.* 3*d.* weekly from the 21st March. It was afterwards discovered that the non-payment arose from the fact that Moran & Son had gone into liquidation, their insurers—the Law Car Company—being also in liquidation. There was some discussion during the hearing of the appeal as to whether the applicant may not ultimately be able to recover the amount to which he is entitled under the award of May; but I assume in considering the legal question that this award is valueless, inasmuch as the sums awarded will never be paid. The Recorder held that the workman having obtained an award against his employers could not obtain a second award.

The argument for the appellant is that section 4 makes the principal and the contractor severally liable, and that, just as an unsatisfied judgment against one of the persons severally liable on a contract would be no answer to a subsequent action against the other, the award of May is no answer to the claim afterwards made against the Corporation. But, apart from the section, there

Appeal. 1912.

MEIER v. CORPORATION OF DUBLIN.

Holmes, L.J.

would be no such several liability. There was no privity of contract between the Corporation and the workman; and if the accident had arisen from negligence by Moran & Son, no action would have lain at common law against the Corporation.

Therefore the appellant can only rely on the provisions of section 4 to entitle him to judgment.

There is no express authority upon how the section is to be construed in relation to the matter in controversy; but there is a judgment of the Court of Session in Scotland—*Herd* v. *Summers* (1)—holding that, under section 4 of the Act of 1897, an award cannot be made against both the undertaker and contractor.

The language of the provision construed in that case seems to me to be at least as favourable, if not more favourable, to the appellant's contention than that of the corresponding provisions in the later Act; and if this decision is good law, it would, I think, follow from it that the present appeal must fail.

There is also a case in the English Court of Appeal—*Mulrooney* v. *Todd* (2)—that bears upon this question. The claim there was made against the contractor and the principal—the Corporation of Bradford. An award was made against both, which was paid by the former; and the Corporation appealed, not on the ground that the award was against the two, but for the purpose of having for their future protection a decision that, in the circumstances, the Corporation had never been under any liability. The question thus raised was held against the appellants; but the Court was careful to point out that it was expressing no opinion as to whether an award could be legally made against both the contractor and the principal.

I turn now to the language of the section. The first clause of section 4 gives the right to claim from the principal, and it deals exclusively with him alone. Indeed, a casual reader might think that in all cases coming within its terms compensation ought to be claimed from the principal. But, even if the first clause stood alone, I should hold that this is not the true construction. The policy of the section is that the right to compensation

(1) 7 F. 870. (2) [1899] 1 K.B. 165.

should not be rendered valueless in cases where the employer of the workman is, from financial weakness, unlikely to be able to pay it. In such cases the workman may make his claim on the principal; but I can find nothing in the clause to suggest that the principal and the contractor are either jointly or severally liable. The final words of the clause, "where compensation is claimed from, or proceedings taken against, the principal, then in the application of the Act references to the principal shall be substituted for references to the employer," indicate that the object of the section is to substitute the liability of the one for that of the other. If there was any doubt on this point in clause 1, it is removed by clause 3, which was inserted to prevent the casual reader from giving to the provision the construction I have mentioned. Clause 3 provides that nothing in the section shall be construed as preventing a workman recovering compensation under the Act from the contractor instead of the principal. This can only mean that it can be claimed from either, but not from both—the interpretation placed on the section by Mr. Beven and Mr. Dawbarn in the last editions of their valuable works on this subject.

The only argument for the appellant turns upon the hardship that arises where, as in the present case, the person from whom compensation is claimed is unable to pay; but in cases where the only person liable is the employer, it occasionally happens that he is insolvent; and the effect of the section giving the workman who comes within its provisions the option of claiming against either of two persons, puts him in a much better position than the general body of workers, to whom the section does not apply. If it were necessary, I could point out the difficulties and complications to which the construction of the appellant would give rise; but I have said enough to justify my interpretation of it.

I have been led to discuss this branch of the case in consequence of its general importance; but I need not have made any reference to it, as this appeal can be decided on another ground about which there ought to be no controversy.

The Recorder made another finding fatal to the application. If, under the section, both the contractor and the principal were liable, there can be no doubt that each of them was entitled to

Appeal. 1912.

MEIER v. CORPORATION OF DUBLIN.

Holmes, L.J.

receive notice of the accident and the claim for compensation under the provisions contained in section 2. Mr. White, for the Corporation, strongly contended that these provisions were not complied with. The accident occurred on the 19th December, 1910, and notice having been first given to the Corporation on the 30th October, 1911, the claim was made on the following day. The Recorder finds as a matter of fact that there was no notice and no claim within the proper time. This can only mean that there was not sufficient notice or claim to satisfy the provisions of the statute—a finding of fact that cannot be questioned in this or any other Court.

CHERRY, L.J.:—

I concur. I do not think that it is necessary to refer to any authority in support of the decision of the Recorder in this case, which appears to me to be manifestly right on the plain reading of the statute itself. Section 4 of the Act of 1906, which confers the right upon a workman employed by a sub-contractor to claim compensation from "the principal" as defined by the section, provides that in the case of such a claim being made against a principal, "then, in the application of this Act, references to the principal shall be *substituted for* references to the employer" (sub-sect. (1)); thus distinctly implying that only one claim can be made. Sub-section 3 of the same section makes the meaning, if possible, still more clear: "Nothing in this section shall be construed as preventing a workman recovering compensation under this Act from the contractor *instead* of the principal." This implies that he cannot have the right as against both. If he elects to go against one, he thereby debars himself from proceeding against the other.

Mr. Gleeson, who argued this case on behalf of the applicant with great ability, contends that the word "recover" in the section is equivalent to "receives payment." Even if this were so, it would not help him in the present case, for the workman here was not only awarded, but actually paid, compensation by his employer, from the 19th December, 1910, to the 21st March, 1911.

I think, however, that the plain meaning of the section is that there cannot be two awards. This is not only the view of the Scotch Courts in the case of *Herd* v. *Summers* (1), mentioned by the Lord Chancellor, but it is the view of two eminent text-writers. "The workman," says Mr. Beven (2), "has either right at his option, but not both." "In many cases," says Mr. Dawbarn (3), "it may be a workman's own employer is financially weak. In this case, if his employer has been working under a contract for someone else, here termed 'the principal,' he is by this section given rights to claim compensation either from such principal or his own employer, but not from both." I think that the law has been correctly stated by both these authors, and that the decision of the Recorder was right, and should be affirmed.

Solicitor for the applicant: *J. G. Lidwell.*
Solicitor for the Corporation of Dublin: *T. F. Burke.*
Solicitor for Moran & Son: *Gerald Byrne.*
Solicitors for the Fidelity and Deposit Co. of Maryland: *F. Gifford & Son.*

W. G.

(1) 42 Sc. L. R. 665.
(2) Beven on Employers' Liability, 4th ed., p. 514.
(3) Employers' Liability and Workmen's Compensation, 4th ed., p. 175.

K. B. Div.
1912.

Feb. 5.

PENDER *v.* LEONARD (1).

(1912. No. 723.)

Practice—Remitting to Civil-bill Court—Action of tort—Infant plaintiff suing by next friend—Allegation of absence of visible means—Sufficiency of affidavit—Common Law Procedure Act (Ireland), 1870, s. 6.

On an application, under s. 6 of the Common Law Procedure Act (Ireland), 187 , to remit an action of tort brought by an infant plaintiff suing by next friend, it is sufficient that the affidavit of the defendant should state that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff; and it is not necessary to state further that the next friend has no such means.

Motion, under section 6 of the Common Law Procedure Act, 1870, to have the action remitted to the Recorder of Dublin, unless security for the defendant's costs given.

The action was brought by the plaintiff, Margaret Pender, an infant, suing by Francis Pender, her father and next friend, claiming damages for injuries sustained by the plaintiff through the negligence of the defendant in the driving of a motor car.

The present motion was grounded on an affidavit of the defendant, stating that he had a good defence, as there was no negligence on his part. On the question of visible means, paragraph 4 of the affidavit set out as follows:—"The plaintiff has no visible means of paying my costs of an action in the High Court should a verdict not be found for her. The infant plaintiff resides with her father, Francis Pender, who carries on the business of a milk-vendor, and resides at Kilmacud Road, Stillorgan, and she is not, I am informed and believe, engaged in any business."

Francis Pender made an affidavit, in which he stated:—"In reply to paragraph 4 of the defendant's affidavit as to the infant

(1) Before Boyd and Kenny, JJ.

plaintiff's means, I say that the contents of the said paragraph disclose no grounds whatever for remitting this action, inasmuch as I, her father and next friend in this action, am liable to the defendant for the costs of this action should a verdict be found for the defendant." The affidavit did not allege or show that either the deponent or the plaintiff had any visible means of paying such costs. The affidavit dealt with the nature of the plaintiff's injuries, into which it is not necessary for the purposes of the present case to go. The Court was of opinion that it was not shown that the injuries were of a serious nature.

In an affidavit made by the defendant in reply, it was alleged that Francis Pender was a dairyman, in a small way of business, and had no visible means of paying the defendant's costs should a verdict not be found for him.

M. F. Linehan, for the plaintiff:—

I rely, as a preliminary point, on the insufficiency of the affidavit of the defendant grounding the motion. The next friend is liable for the costs of the action, and the affidavit should have negatived his visible means of paying costs. The defect cannot be cured by a subsequent affidavit. [He referred to *Marron* v. *Hunter* (1).]

James Little, for the defendant:—

The defendant, in his original affidavit, swears that the plaintiff has no visible means of paying his costs, and thus brings himself within the words of the section.

BOYD, J.:—

We are of opinion that this is a proper case to remit. It is stated in the defendant's affidavit that the plaintiff has no visible means. It is not alleged that the minor has any visible means, and the affidavits filed on behalf of the plaintiff do not show that her next friend, through whom she sues, has visible means. The injuries to the plaintiff are not of a serious character.

(1) 23 I. L. T. R. 2.

K. B. Div. 1912.

PENDER v. LEONARD.

KENNY, J. :—

I wish to add a word with reference to the preliminary point raised by Mr. Linehan. The action is one brought by the plaintiff, an infant, suing by her next friend, claiming damages for negligence. The case, therefore, comes within the 6th section of the Common Law Procedure Act, 1870 ; and to give the Court jurisdiction to remit, the affidavit of the defendant must set forth that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff. The section does not otherwise deal with a case in which the plaintiff is an infant, suing by a next friend, and makes no provision for an allegation that the next friend has no visible means. In the case of *Marron* v. *Hunter* (1), referred to by Mr. Linehan, it was held sufficient to swear that the next friend had no visible means. That was the converse of the present case. Here the defendant brings himself strictly within the words of the section, by swearing that the plaintiff has no visible means. The point is raised, however, that the affidavit should go further, and set forth not merely that the plaintiff has no visible means, but that the next friend has none. In the absence of any authority on the point—for none has been cited, and I am aware of none—I am of opinion that the statement in the affidavit here is tantamount to an averment that there are no visible means available to pay the defendant's costs, and that the defendant has brought himself within the section.

Assuming that the affidavit as to want of visible means is sufficient, the only other question is, whether the action is one fit to be retained in the Superior Court. The plaintiff, on whom the *onus* of proving this lies, has not satisfied me that it is, and I therefore agree in thinking that the action should be remitted.

Solicitor for the plaintiff: *John Geo. Lidwell.*
Solicitor for the defendant: *J. S. Finnegan.*

J. G. T.

(1) 23 I. L. T. R. 2.

THE STRABANE CANAL COMPANY, LIMITED *v.* THE LONDON & NORTH-WESTERN AND LANCASHIRE & YORKSHIRE RAILWAY COMPANIES (1).

K. B. Div. 1912. Feb. 19.

(1911. No. 13474.)

Practice, Admiralty—Action for damages from collision—Transfer to Admiralty side of King's Bench Division—Judicature Act (Ireland), 1877 (40 & 41 *Vict. c.* 57), *ss.* 9, 48—*Judicature Act (Ireland)*, 1897 (60 & 61 *Vict. c.* 66), *s.* 6—*R. S. C., Order XXXVI, R.* 5; *Order XLIX, R.* 3.

The plaintiffs brought an action in the King's Bench Division for damages to their barge, occasioned by a collision in the River Foyle, near Londonderry, owing to the alleged negligence of those in charge of a steamer of the defendants. The venue was laid in the county of the city of Londonderry, admittedly the most convenient venue, having regard to the residences of the witnesses. The pleadings raised questions as to the proper navigation of the respective vessels, and the observance by those in charge of them of certain of the Regulations for Preventing Collisions at Sea. The Court, on the application of the defendants, made an order that all further proceedings in the action should be carried on as an action in the King's Bench Division (Admiralty), and the action disposed of by the Judge assigned for the hearing of Admiralty actions, assisted by nautical assessors.

MOTION on behalf of the defendant companies for an order that the action might be transferred to the Admiralty side of the King's Bench Division, and that all further proceedings therein might be carried on as an action in the King's Bench Division (Admiralty), and that the said action might be disposed of by the Judge assigned for the hearing of Admiralty actions; or in the alternative for an order that the venue in the action might be changed to the county of the city of Dublin, and that the action might be there tried by a Judge without a jury assisted by nautical assessors at such time and in such manner as the Court might direct.

1 Before PALLES, C.B., and GIBSON and BOYD, JJ.

K. B. Div. 1912.

STRABANE CANAL CO. *v.* L. & N. W. AND LANCS. & YORKS. RY. COMPANIES.

The action was brought by the plaintiffs claiming as owners of the barge No. 6, of Strabane, and as common carriers of the goods laden therein, against the defendants as owners of the S.S. "Duke of Cornwall," for damages occasioned by a collision which took place in the River Foyle, at Londonderry, on the 17th August, 1911, owing to the negligence of those in charge of the S.S. "Duke of Cornwall."

The statement of claim alleged that the plaintiffs had suffered damage by reason of a collision between their barge No. 6 and the defendants' steamship "Duke of Cornwall," which was solely caused by the negligent and improper navigation of the "Duke of Cornwall" by the defendants or their servants. The circumstances under which the collision was alleged to have taken place were set out, from which it appeared that it had happened shortly after the barge had left the wharf at Londonderry, bound for Strabane, in tow of a steam tug. "Particulars of negligence" were set out in the statement of claim, alleging, amongst other matters, that the "Duke of Cornwall" improperly failed to keep her own starboard side of the river and to pass, if she wished to pass, on her proper side; improperly failed to port her helm; and improperly failed to observe Articles 19, 23, 24, 25, 28, and 29 of the regulations for preventing collisions at sea, and certain bye-laws of the Londonderry Port and Harbour Commissioners.

The statement of claim claimed £1000 damages, and named as the place of trial the county of the city of Londonderry.

By their statement of defence, the defendants denied that the collision was occasioned or contributed to by the negligent or improper navigation of the "Duke of Cornwall" or by any negligence on the part of the defendants, or either of them, or their respective servants, and alleged that it was caused solely by the negligent and improper navigation of the plaintiffs' barge, and of the tug towing it, by the plaintiffs and their servants. They charged, amongst other matters of negligence on the part of the plaintiffs, that the tug and barge negligently and improperly attempted to cross and turn in the river at a time and place and in a manner improper under the circumstances, and where there was insufficient room to do so, and without regard to other vessels using the river, and without, by sound signals or

otherwise, indicating the intention to do so; and that those in charge of the tug and barge improperly failed to observe Articles 21, 27, 28, and 29 of the Regulations for Preventing Collisions at Sea, and certain bye-laws of the Londonderry Port and Harbour Commissioners.

From affidavits made on the present motion, it appeared that all the plaintiffs' witnesses resided in or near Londonderry, and that the defendant's witnesses consisted for the most part of the master and crew of the "Duke of Cornwall" and the crews of other vessels, all engaged in regular sailings between Londonderry and England.

The King's Advocate (*Ronan, K.C.*), with him *the Hon. Cecil Atkinson*, for the defendants:—

I admit that, in an ordinary case, the county of the city of Londonderry would be the natural venue. In the present case, however, difficult questions of navigation will arise, and obviously the proper tribunal to determine these is the tribunal specially constituted for the hearing of actions of the kind, viz., the Judge assigned to hear Admiralty actions, sitting with nautical assessors. It may be contended by the plaintiffs that they are entitled as of right to have a trial by jury, and that by transferring the action to the Admiralty side of the King's Bench Division they will be deprived of this right. We submit, however, that no such right exists. The test is whether or not previously to the passing of the Judicature Act (Ireland), 1877, an action of this kind could have been, without the consent of the parties, tried without a jury: Judicature Act (Ireland), 1877, s. 48; Order XXXVI, Rule 5. We contend that it could, since in such class of action the Court of Admiralty, in which there was no right to a jury, had concurrent jurisdiction with the Courts of Common Law. Section 28 (9) of the Judicature Act (Ireland), 1877, provides that in collision cases the rules which were in force in the Court of Admiralty, so far as they had been at variance with the rules in force in the Courts of Common Law, shall prevail. Even assuming that the plaintiff was entitled as of right to a jury, such right would not be affected by a transfer of the action to the Admiralty side. The questions, however, which will arise in the present case are such

K. B. Div. 1912.

STRABANE CANAL CO. *v.* L. & N. W. AND LANCS. & YORKS. RY. COMPANIES.

as could not be tried satisfactorily before a jury. One of these questions, for example, will be whether the defendants observed Article 24 of the Regulations for Preventing Collisions at Sea. Could a jury be expected to understand the highly technical definition given in that Article of an "overtaking vessel"? We ask for an order that all further proceedings may be carried on on the Admiralty side of the King's Bench Division, and disposed of by the Judge assigned for the hearing of Admiralty actions, assisted by nautical assessors. [He referred to the Judicature Act (Ireland), 1877, s. 9; Judicature Act (Ireland), 1897, s. 6.]

Henry, K.C. (with him, *James Andrews*), for the plaintiffs:—

The present case does not come within any of the rules of Order XLIX, dealing with the transfer of an action. [Gibson, J.: Apart from the rules, is there not an inherent power in the Court to transfer the action?] Not where the effect is to deprive the party of his right to a trial by jury. If the action, in its present form of a Common Law action for damages, had been brought prior to the Judicature Act (Ireland), 1877, the plaintiffs would have been entitled as of right to a trial by jury. This right is expressly preserved by section 48 of the Judicature Act of 1877, and Order XXXVI, Rule 5, of the rules of Court. Even if there was jurisdiction to order the transfer applied for, the Court in its discretion should refuse to do so, having regard to the inconvenience and expense of bringing such numbers of witnesses up to Dublin.

The Court made an order to the following effect:—

"It is ordered that all further proceedings herein shall be carried on as an action in the King's Bench Division (Admiralty), and that the said action shall be disposed of by the Judge assigned for the hearing of Admiralty actions; and on the application of the defendants' counsel, It is further ordered that the said Judge be assisted by nautical assessors, and that the costs of this motion on both sides be costs in the action."

Solicitors for the plaintiffs: *Carson & M'Dowell.*
Solicitors for the defendants: *Hayes & Sons.*

J. G. T.

THE KING (BRANSFIELD) *v.* THE JUSTICES OF COUNTY CORK (1).

K. B. Div.
1912.
Jan. 22, 23.

Justices—Surety of the Peace—Exclusive jurisdiction of Justice first seised of the case.

F., a resident magistrate, on an information in writing and on oath, made before him by D., issued a warrant to arrest B. and bring him before F. to answer the complaint of D. requiring surety of the peace from B.

Held, that F. had sole seisin of the case, and that other Justices of the district could not intervene in adjudicating on it without his consent.

Prior to the hearing of the case against B., a summons issued by B. demanding surety of the peace from D. had been heard and dismissed by F. and other Justices sitting at Petty Sessions.

Held, that this did not affect the exclusive jurisdiction of F. in the case against B.

A warrant had been issued by the Hon. John French, a Resident Magistrate and Justice for the County of Cork, upon an information sworn before him by one Michael J. Daly, to arrest John P. Bransfield, the prosecutor herein, and bring him before Mr. French to answer the complaint of Daly. The warrant recited that, "whereas a complaint has been made on oath and in writing that the defendant did at Midleton, in the county of Cork, on the 12th November, 1911, unlawfully threaten and abuse the complainant, and by violence and menaces put him in bodily fear; complainant fears the defendant will put his threats into execution, and on that account prays protection of the law." It further recited that the complainant had sworn an information as to above complaint, and went on to command the persons to whom it was addressed to arrest Bransfield and bring him before Mr. French, to answer the said complaint. The warrant was headed—

"Petty Sessions (Ireland) Act, 1851, 14 & 15 Vict. c. 93.

"(Form Bb) Warrant to arrest."

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and DODD, J.

K. B. Div. 1912.

THE KING (BRANSFIELD) v. JUSTICES OF CORK.

It followed Form Bb, in the Schedule to the Petty Sessions Act, except that it merely directed the defendant therein to be brought before Mr. French, omitting the words, "or some other Justice of the county."

No summons had been issued against the prosecutor prior to the issuing of the warrant.

The prosecutor had issued a summons against Michael J. Daly, complaining of abusive and insulting language calculated to provoke a breach of the peace, used by Daly towards him on the date in question, the 12th November, 1911, and seeking to have Daly bound to the peace. This summons was entered for hearing and heard at the Petty Sessions held on the 16th November, 1911, for the Petty Sessions district of Midleton, county Cork. Four Justices sat at these Petty Sessions—Mr. French, R.M. (who presided), and Messrs. Thomas J. Bourke, Michael Buckley, and Michael Murphy. After hearing the evidence of Bransfield and of certain others examined on his behalf as to what took place between him and Daly on the occasion in question, from which it appeared that Daly had used provocative language to Bransfield, and that Bransfield had assaulted Daly, the magistrates retired to consider the evidence, and decided to dismiss the summons. They returned into Court and their decision was announced by Mr. French. This concluded the cases which had been listed for hearing at the Petty Sessions.

The information against Bransfield had not been listed for hearing at the Petty Sessions, but on the conclusion of the cases listed it was entered in the order-book, and the case taken up, he being then in Court in custody under the warrant. All four Justices continued to sit on the Bench during the hearing of the case. Daly was examined as a witness, and an order was made by Mr. French that Bransfield should enter into a recognizance in the sum of £50 with two sureties in the sum of £25 each to keep the peace, and be of good behaviour for twelve calendar months, and on failure to comply with this order to be imprisoned for three calendar months, unless the recognizance sooner entered into. This order was entered in the Petty Sessions Order-book and signed by Mr. French. In the third column of the order-book the name of Mr. French alone appeared as the Justice making

the order. In the fifth column, headed "name of witnesses examined, and whether for complainant or defendant," the entry was, "Michael J. Daly, defendant, appears in custody on a warrant issued 13/11/11." In the sixth column, headed "cause of complaint as set forth in summons," the entry was, "Application to bind to the peace. Defendant did, at Midleton, county of Cork, on the 12th November, 1911, unlawfully threaten and abuse the complainant, and by violence and menaces put him in bodily fear. Complainant fears defendant will put his threat into execution, and on that account complainant prays the protection of the law." The seventh column sets out the order made, the substance of which is given above. In the eighth column, under the heading "Act under which order made," there was set out "34 Edw. 3, c. 1, and Commission."

The prosecutor obtained a conditional order for a writ of *certiorari* to quash the above-mentioned order on the grounds, *inter alia*:—(*a*) That the order was bad on its face; (*b*) that it was made without and in excess of jurisdiction; (*c*) that no summons was issued, and that the Justices had no jurisdiction to hear the complaint; (*d*) that the Justices present adjudicated and heard the complaint and dismissed the same, and that the order was not a true record of their ruling.

Affidavits were made by the prosecutor and his solicitor in which it was stated that after the summons against Daly had been heard the case against the prosecutor was mentioned, and Mr. French said, "We will take it next." That, after hearing Daly's evidence, Mr. French said that the decision of the Court was that Bransfield should be bound to the peace himself in £50 and two sureties of £25 each, or go to jail for three months. That the prosecutor's solicitor then asked if that was the decision of the majority of the Bench, and Mr. French answered that it was his decision, and the others had nothing to do with it. That was the first intimation he had given that he claimed to try the case alone. That the prosecutor's solicitor then asked each of the other three magistrates what his decision was, and each replied that he dismissed the case. That Mr. French then insisted that the other magistrates had nothing to do with the case.

Mr. French, in an affidavit made by him and filed on behalf

K. B. Div. 1912.

THE KING (BRANSFIELD) v. JUSTICES OF CORK.

of the Crown by way of cause against making the conditional order absolute, stated that at the conclusion of the ordinary Petty Sessions business, when all the cases in the Petty Sessions book had been disposed of, he announced that he would hear the case against the prosecutor. That he advised his colleagues on the Bench not to adjudicate in this case, as he had special cognizance of it, and the proceedings had begun before him. That the other three Justices acceded to his request, and, although they did not leave the Bench, did not adjudicate. That it was not true that he said, "We will now hear the case," or used any words to suggest that the other Justices were adjudicating in the case. That after hearing Michael J. Daly repeat verbally on oath the matters already sworn to in his information, and hearing the solicitor for the prosecutor, he made the order now sought to be quashed.

The other three Justices, Messrs. Bourke, Buckley, and Murphy, made a joint affidavit, filed on behalf of the prosecutor, in which they deposed that Mr. French stated, in reference to the case against the prosecutor, "We will hear it next," and that his recollection was inaccurate in stating to the contrary in his affidavit. That he was also mistaken in stating that the ordinary business of the Petty Sessions had concluded before the information was heard, as he was in stating that he advised them not to adjudicate, and that they acceded to his request. That they were positive no information whatever was given by the chairman or clerk, as is usually done, that the business of Petty Sessions had concluded, nor did Mr. French ask them not to adjudicate in the case, nor did they or any of them agree to adopt, nor did they adopt, any such course; that, on the contrary, they sat and heard the case in the usual way, and the first intimation they had of the adoption of such course was when Mr. French claimed to give his decision as the sole adjudicating magistrate, and that each of them then gave a contrary decision dismissing the case, but that nevertheless Mr. French, in spite of their protest, entered his own decision in the order book. That in the case against Daly the magistrates were at first inclined to the view that Daly should be bound to the peace, as his language had been deliberately provocative, but that both he and Bransfield being respectable men, and Daly having been punished by the blow he received,

and Bransfield having used no language calculated to provoke to a breach of the peace, the interests of the public peace would be best preserved and a more amiable feeling created by dismissing both cases.

The Clerk of Petty Sessions made an affidavit, merely stating that the information by Daly against Bransfield was not listed for hearing at the said Petty Sessions, but, on the conclusion of the Petty Sessions cases which had been listed for hearing, his information was then for the first time entered in the order-book.

M'Sweeny, K.C. (with him *H. J. Molony*), for the prosecutor:—

The order is bad on its face, inasmuch as it purports to be made on a complaint "as set forth in summons," whereas there was no summons.

It is also bad because it does not represent the decision of the majority of the Court, but of Mr. French alone, the other three Justices being of opinion that the case should be dismissed. The case came on at Petty Sessions, and the other Justices sitting, as well as Mr. French, were seised of the case. They had a right to adjudicate, and they did adjudicate. The warrant purports to be in Form B (b) in the schedule to the Petty Sessions Act. It was obviously issued under the provisions of section 1, sub-section (2), of the Act, under which provisions it is not necessary that the Justice who hears the case should be the Justice who issued the warrant. The form of the order shows that it was made at Petty Sessions. It is entered in the order-book, and there is no statement that it was made out of Petty Sessions, which should have been stated if such had been the case. The order purports to be made under the Commission as well as the statute 34 Edw. 3, c. 1. The Commission is to the Justices of the county jointly and severally. [Palles, C.B.: I find the following statement of the law in Paley on Summary Convictions (8th ed., p. 54):—"All the Justices of each district are equal in authority; but, as it would be contrary to the public interest, as well as indecent, that there should be a contest between different Justices, it is agreed, that the jurisdiction in any particular case attaches in the first set of magistrates, duly authorized, who have possession and cognizance of the fact, to the exclusion of the

K. B. Div. 1912.

THE KING (BRANSFIELD) *v.* JUSTICES OF CORK.

separate jurisdiction of all others."] If the statement of the other three magistrates is to be believed, they entered on the hearing of the case with the assent of Mr. French. Even assuming that Mr. French had originally sole seisin of the case, it cannot be contended that the other Justices could not, with his assent, take part in the adjudication. The impression on the public and on the accused is a matter to be taken into consideration. Here the impression conveyed by these three magistrates remaining on the Bench would certainly have been that they were taking part in the adjudication. On the hearing of the summons against Daly before Mr. French and the other three Justices, evidence was gone into of all that took place between Bransfield and Daly, in respect of which both complaints arose. All four Justices were seised of the subject-matter of the two complaints. On the hearing of the summons against Daly they would have had jurisdiction to have ordered Bransfield, although the complainant, to enter into sureties for the peace.

The Solicitor-General (*Ignatius O'Brien*, *K.C.*) (with him *H. MacDermot*), for the Crown :—

The order is good in form. The words " as set forth in summons " are mere surplusage, and may be disregarded : *The King* (*U.D.C.*, *Athy*) v. *Justices of Kildare* (1), *per* Lord O'Brien, L.C.J., and Gibson, J.

[*M'Sweeny*, *K.C.* : I do not press this point.]

Mr. French had exclusive jurisdiction to hear the information against Bransfield. The law on the subject is thus stated in 2 Hayes, Criminal Law, p. 839 :—" If the warrant direct that the party shall be brought before the Justice who issued it, that ought to be carefully attended to by the constable. In general this will be found the most convenient mode of framing the warrant, as the Justice who takes the original informations will best know the circumstances, and how the surety is to be measured. But if the warrant authorize the bringing him before any other Justice of the same county, the constable may elect before what Justice he shall be brought." In the present case the information

(1) *Ante*, p. 64, at pp. 78 and 88.

was taken by Mr. French, and the warrant directed Bransfield to be brought before Mr. French, no other Justice being mentioned. The other Justices, therefore, had no right to intrude in the matter without Mr. French's assent. It is evident, whatever the other Justices may have thought, that Mr. French objected to their interfering, and that he intended to, and did, adjudicate by himself, the ordinary Petty Sessions business being then concluded. The circumstance that the summons by Bransfield against Daly was heard by all four Justices and dismissed, cannot affect Mr. French's sole jurisdiction on the information against Bransfield. The two cases were heard separately. The argument is that because on the evidence given on the hearing of the summons against Daly the Justices might have bound Bransfield to the peace, and did not, this amounted to an adjudication in favour of Bransfield, and deprived Mr. French of jurisdiction. To yield to such an argument would be to to hold that if A assaulted B, and then issued a summons demanding surety of the peace against B, alleging that B had assaulted him, which summons was dismissed, this would preclude B from afterwards applying for surety against A.

Comyn, for Michael J. Daly, proposed to read certain affidavits filed by way of cause on his behalf.

M'Sweeny, K.C., objected, on the ground that the affidavits were not filed untill after the time allowed for showing cause had expired.

The Court refused to allow the affidavits to be read.

M'Sweeny, K.C., in reply.

LORD O'BRIEN, L.C.J. :— Jan. 23.

This case stands thus. A man named Daly was by summons sought to be bound to the peace and good behaviour by a man named Bransfield. This summons was heard at Petty Sessions before four magistrates, the Honourable Mr. French and three others, and the summons was dismissed. It is, in my opinion, absolutely plain that this case against Daly was separately dealt with. Upon the conclusion of the case against Daly the magistrates retired to give separate consideration to it, and adjudicated

K. B. Div. 1912.

THE KING (BRANSFIELD) *v.* JUSTICES OF CORK.

upon it and separately recorded their conclusion in the Petty Sessions book. It is plain therefore that Daly's case was separately heard. I refer to this because it was alleged that Daly's case and Bransfield's case were heard together, and that the magistrates simultaneously dealt with both cases.

Lord O'Brien, L.C.J.

When Daly's case was disposed of, the case against Bransfield came on. Bransfield was not brought there by summons. He was brought by warrant issued by Mr. French, and the case was not listed for hearing at the Petty Sessions. Mr. French, in his affidavit, states that he told the other magistrates present that he alone would hear the case, and that he advised them not to adjudicate, as he had special cognizance of it. The other magistrates have made an affidavit stating that Mr. French's statement as to this is inaccurate; but it may be that they did not hear what he said. The fact that Mr. French says he made the statement is more important than the contradiction by persons who may not have heard it. I do not think that this is an invention of Mr. French's. I firmly believe that he said what he states in his affidavit.

The case against Bransfield then, as I have said, came on. I have the information on which Mr. French granted the warrant, and there is no question that if Bransfield was guilty of the conduct alleged in that information, he ought to have been bound to good behaviour. Mr. Comyn, who claimed the right to appear for Daly, sought very earnestly to read an affidavit made by Daly, which he said would show the true character of Bransfield, but as he was not allowed to read it, it not having been made in due time, I say nothing more about it.

At first I was rather inclined to be with Mr. M'Sweeny, who argued the case so well. But although my mind fluctuated during the arguments, the Solicitor-General has satisfied me that his contention is right. The warrant was issued by Mr. French on an information sworn before him, and the warrant directs Bransfield to be brought before him alone, no other magistrate being mentioned. In fact, the usual form as to bringing an accused person before the magistrate who signed the warrant "or some other Justice," was altered by the latter words being struck out. No doubt three other magistrates happened to be in Court when the

case came on, but what was their position? I do not like to use the word "intruders," because I am very particular as to the language I employ about magistrates, yet I think, although they may have believed that they were taking part in the adjudication, that they were, strictly speaking, intruders, inasmuch as Mr. French had sole seisin of the case. No doubt Mr. French may as a matter of courtesy have not peremptorily silenced the other magistrates, but allowed them to interpose as *amici curiæ*. I am satisfied that when they did interpose, Bransfield had been brought before Mr. French, and that the case had been entered upon by him, and that he then had sole seisin and possession of the case. I think that the passage from Paley on Summary Convictions (8th ed., p. 54), read by the Lord Chief Baron during the argument, shows this. It is as follows:—"All the Justices of each district are equal in authority; but as it would be contrary to the public interest, as well as indecent, that there should be a contest between different Justices, it is agreed that the jurisdiction in any particular case attaches in the first set of magistrates duly authorized who have possession and cognizance of the fact, to the exclusion of the separate jurisdiction of all others." Here Mr. French was the first magistrate duly authorized who had possession and cognizance of the case; and the jurisdiction, in my opinion, attached to him alone, and there was ample evidence before him to justify him in making the order he did.

Mr. French's statement of what took place is borne out by all the contemporary documents, and is, I think, also borne out by the affidavit of the clerk of Petty Sessions. I thought at first that it was an important factor in the case that this affidavit did not confirm in all respects Mr. French's statement of what took place, but on consideration it appears to me, and I think to the other members of the Court, that the clerk of Petty Sessions naturally, and I think justifiably, wished to preserve a neutral position, and not to enter into the matter in controversy between the magistrates. He says, however, that the information against Bransfield was not listed for hearing at the Petty Sessions, but was listed for hearing at the conclusion of the Petty Sessions cases, and that it was not comprised within the Petty Sessions

K. B. Div. 1912.

THE KING (BRANSFIELD) v. JUSTICES OF CORK.

Lord O'Brien, L.C.J.

cases; in fact, that particular case stood outside the Petty Sessions cases so far as related to listing. I am of opinion that the case was treated by Mr. French as a jurisdiction resting with himself alone. I do not think that the other magistrates had, under the particular circumstances, any jurisdiction to interfere.

A point has been made as to the order being entered in the Petty Sessions order-book. It may be that under the Petty Sessions Act this is necessary to be done; but, even if not, I think this is a convenient mode of recording what has been done. I may refer to a case of *The Queen* (*Murphy*) v. *Justices of Wexford* (1), a case in which a road contractor obtained an order to enter lands to take stones. I there expressed the opinion that although in such a case the order was one which, strictly speaking, need not be entered in the Petty Sessions order-book, yet that so entering it was a convenient mode of making a minute of what took place.

On the whole case I am clearly of opinion that Mr. French had separate jurisdiction to make the order, and that the other magistrates had no jurisdiction. The application must be refused, but without costs.

PALLES, C.B.:—

The settled rule as to the jurisdiction of Justices is, that in each particular case it attaches to the first set of Justices duly authorized who have possession and cognizance of the facts.

The reason of it is well stated in Paley on Convictions (8th ed., p. 54) to be "that it is contrary to the public interest, as well as indecent, that there should" as to this "be a contest between different Justices."

Now, in the present case, the jurisdiction attached to Mr. French, who, by Mr. Daly's information sworn before him, had possession and cognizance of the facts relied on as entitling the informant to have sureties of the peace from Mr. Bransfield, the prosecutor here.

Mr. French thus having jurisdiction, and the matter being one cognizable by a single Justice, had jurisdiction to make his

(1) [1894] 2 I. R. 81.

warrant for Bransfield's arrest returnable before himself, and he accordingly did so. The effect of this is thus stated in the late Mr. Justice Hayes's admirable work on the Criminal Law (2 Hayes, p. 839).

"If the warrant direct that the party shall be brought before the Justice who issued it, that ought to be carefully attended to by the constable. In general, this will be found the most convenient mode of framing the warrant, as the Justice who takes the original informations will best know the circumstances, and how the surety is to be measured. But if the warrant authorize the bringing him before any other Justice of the same county, the constable may elect before what Justice he shall be brought."

In the present case the constable had no such election, and he rightly brought the prosecutor to Mr. French, who was then sitting in Petty Sessions with other Justices; and at the conclusion of the business of such Petty Sessions Mr. French proceeded to hear the application for sureties.

Had it not been that at the Petty Sessions, then concluded, an application on summons by Bransfield that Daly should give sureties to keep the peace towards him had been heard, and that it appeared upon the evidence on that application that the subject-matter out of which it arose was identical with that relied on by Daly in support of his application, it could not be contended that Mr. French's sole jurisdiction to hear Daly's application was affected. It is true that the Justices at Petty Sessions who heard Bransfield's application had, from the evidence before them, jurisdiction to order Bransfield himself to provide sureties. Their jurisdiction to do so was part of their general, and I may say the all-pervading, jurisdiction to keep the peace—a jurisdiction which could be exercised without application; but any such action would have been incidental and collateral to the determination of the application before them, and not a necessary part of it.

Had they done so, Mr. French's jurisdiction to hear Daly's application that Bransfield should provide sureties would have ceased; but in that event it would have ceased *because of that order*. The Justices at Petty Sessions, however, did not make any such order; and their dismissal of Bransfield's complaint did not,

K. B. Div. 1912.

THE KING (BRANSFIELD) *v.* JUSTICES OF CORK.

Palles, C.B.

in my opinion, affect Mr. French's jurisdiction *and obligation* to hear Daly's complaint.

Mr. French might have requested the Justices at Petty Sessions to associate themselves with him in hearing Daly's application, but I am of opinion on the facts that he not only did not do so, but that he persistently refused to permit them to do so.

I desire to be understood as not discrediting the three other Justices. I believe that they thought they were authorized to hear, and believed that they were in fact hearing, Daly's application; but in law they had not jurisdiction to do so, and their belief that they had it could not confer it upon them, or affect the action of Mr. French, in whom the sole jurisdiction was vested, and who acted throughout regularly in that jurisdiction.

In my judgment, the application for a *certiorari* should be refused, but, having regard to the action of the Justices, other than Mr. French, which not unnaturally led the prosecutor to believe that the Justices had dismissed the application, without costs.

DODD, J.:—

I base my decision solely on the ground that a Justice having jurisdiction, and, in my opinion, sole jurisdiction, exercised that jurisdiction on evidence that was adequate. Whatever controversy in fact there is as to what was said either by the presiding magistrate or by the Justices, there is no controversy that at some part of the case the resident magistrate claimed to have and to exercise sole jurisdiction. The claim was, in my opinion, well founded. The decision was his, and it is so recorded, and rightly recorded.

Solicitor for the prosecutor: *John Molony.*
Solicitor for the Crown: *Malachy Kelly.*

J. G. T.

THE PITNER LIGHTING COMPANY OF IRELAND v. WILLIAM GEDDIS AND GEORGE PICKERING (1).

K. B. Div. 1912. Jan. 23, 24. Feb. 29.

Contract — Appropriation of payments — Novation — Limited Company — Liability of parties constituting a partnership which is subsequently registered as a limited company for goods supplied to the partnership — Continuous account — Subsequent division and re-arrangement thereof.

W. G. and G. P. formed themselves into a partnership called the Simpitrol Lighting Company, and entered into a written agreement with the plaintiffs, upon foot of which goods were supplied to such company. In the course of a few months after its inception, the Simpitrol Lighting Company was duly registered as a limited company, and the plaintiffs continued to supply goods under the written agreement aforesaid to the new limited company, and kept the account thereof in their ledgers as one continuous account. The company, while unregistered, made no payments to the plaintiffs, but did make considerable payments while registered as a limited company. Finding difficulty in getting payment of their accounts, the plaintiffs divided and re-arranged the account in their ledger, appropriating the payments made as against the goods supplied to the new limited company, and sued W. G. and G. P. on the written agreement for the goods supplied to the company while it was unregistered.

Held, that on these facts the plaintiffs were entitled to succeed.

NEW TRIAL MOTION.

The plaintiff company sued the defendants for £84 for goods sold and delivered to the defendants on foot of a contract signed by the defendants, and dated the 18th September, 1910. The defendant William Geddis did not defend, and judgment was marked against him. On a motion for final judgment against the other defendant, George Pickering, leave was given to the latter to defend, on lodgment in Court of £84, and the action was tried on December 11th, 1911, before Gibson, J., and a common jury of the city of Dublin.

The following facts, as appears from the Judge's notes, were given in evidence at the trial :—

The goods in question were supplied on orders of a company

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and DODD, J.

K. B. Div. 1912.

PITNER LIGHTING CO. *v.* GEDDIS AND PICKERING.

called the Simpitrol Lighting Company of Ireland, which originally consisted of the two defendants, who signed the contract, dated the 18th of September, 1910, on foot of which the goods were supplied. The company was subsequently, upon the 4th of January, 1911, registered under the same name as a limited company, in accordance with the provisions of the Companies (Consolidation) Act, 1908. From the date of the contract aforesaid, up to the time at which the limited company was registered, the plaintiffs had supplied goods to the Simpitrol Lighting Company, and after that date continued to supply goods to the limited company, all on foot of the agreement of the 18th September, 1910. Finding difficulty in obtaining payment of their accounts, the plaintiffs proceeded to divide up and re-arrange the account into two, which up till then had been kept in their ledger as one continuous account, in the name of the Simpitrol Lighting Company. Subsequent to the 4th of January, 1911, the date of the registration of the company as a limited company, statements of account, including goods that had been supplied to the unregistered company, and also letters requesting payment of the amounts of such statements, were sent by the plaintiffs to the limited company, and payments amounting to about £130 were made by the limited company to the plaintiffs, on various dates from March 30th to October 3rd, 1911. The plaintiffs' manager became aware of the registration of the defendant company as a limited concern some time in Feb., 1911, when he saw it announced in the *Dublin Gazette*. It appeared from the evidence of the plaintiffs' bookkeeper (Jones) that the amount of the goods supplied to the Simpitrol Lighting Company, while unregistered, was £114 2*s*. 5*d*., there being no credits in its favour during this period. During the registered period the goods supplied amounted to £188 3*s*. 1*d*., and the credits in its favour during the same period were £193 19*s*. 8*d*. Part of these credits was made up of goods returned which had been supplied to the unregistered company. When making the division of the account in July, 1911, the plaintiffs appropriated all the payments made by the Simpitrol Lighting Company against the goods supplied to the registered company, and now sought to recover against the defendant personally the value of the goods supplied to the company while it was unregistered.

At the conclusion of the plaintiffs' case, *James O'Connor, K.C.*, for the defendant Pickering, asked for a direction as to the appropriation of the payments. The Judge declined to direct.

The defendant Pickering gave evidence to the effect that the Simpitrol Company was formed at the suggestion of the plaintiffs to be their sole agents in Ulster; that the delay in registering it as a limited company was caused by the plaintiffs themselves. There was no partnership agreement in writing between the persons who constituted the company while unregistered, nor was there any conveyance of the property and rights of the partnership to the new registered company.

At the close of the defendants' case, *D. M. Wilson, K.C.* (for plaintiffs), asked for a direction as to novation, which was refused by the Judge.

The questions left to the jury, with their answers, are as follows:—

1. Were the goods sued for supplied on the credit of defendants under contract of September, 1910? Answer—"On credit of the defendants."

Or,

on the credit of a supposed actual or intended company?

2. Was the account kept as a continuous account, not distinguishing between liability for the period before and after the formation of the limited company? Answer—"Yes."

3. Was there an agreement between plaintiffs, defendants, and the limited company, that the company should be substituted for the defendants as to liability before 4th January, 1911? Answer—"No."

4. Have the plaintiffs received payment from the company for all the items included in the old account? Answer—"No."

Or,

some, and which of them? Answer—"No."

Upon these findings, the jury found for the plaintiffs for £82, and the Judge gave judgment for the plaintiffs as against the defendant George Pickering, for £82, with costs, and ordered that the sum of £84 11*s.* 4*d.*, lodged in Court by the said defendant,

K. B. Div. 1912.

PITNER LIGHTING CO. v. GEDDIS AND PICKERING.

George Pickering, be paid out to the plaintiffs in satisfaction of their said judgment-debt and costs.

The defendant, George Pickering, moved that the said judgment be set aside, and that judgment be entered for himself, or, in the alternative, that a new trial be granted upon the grounds—(1) that the learned Judge should have directed a verdict for the said defendant; and (2) that the findings of the jury in reply to questions 1, 3, and 4, submitted to them by the learned Judge, were against the evidence and weight of evidence and were perverse.

James O'Connor, K.C., and *John Bartley*, for defendant:—

The facts showed there was a novation by which the plaintiffs in the action agreed to substitute for the liability of the defendants the credit of the Simpitrol Lighting Company, Limited. On the question of novation the verdict of the jury is against the evidence and the weight of evidence. The plaintiffs had no lawful power to appropriate, in the way they have done, the payments made by the Simpitrol Company. They should have appropriated the payments to the goods in the order in which such goods were ordered and supplied. They looked to the company all along, and kept the accounts as one continuous account, and they could not at a subsequent period divide up the account, and make a new appropriation of the payments.

D. M. Wilson, K.C., and *Best*, contra:—

There is no evidence of novation. Why should the plaintiffs give up their rights against the defendant Pickering, who is a man of mark, for a chance against a limited company, in which a very small sum had been subscribed? It would take very strong evidence to establish that proposition. Appropriation depends on the intention of the parties, and intention depends on knowledge.

[The authorities relied on in the course of the argument are discussed in the judgment of the Court.]

PALLES, C.B., delivered the judgment of the Court :—

The jury found that the goods, for the price of which the verdict was obtained, were supplied on the credit of the defendants under a written contract of 18th September, 1910. This finding is not objected to.

It, therefore, lay upon the defendants to prove that their liability to pay was at an end.

This they sought to do by showing—(1) That there was a novation; that is, an agreement between the plaintiffs, the defendants, and the Simpitrol Lighting Company, Limited, that the limited company should become liable for payment of the goods ordered before its incorporation, and that the plaintiffs accepted that liability of the company in lieu of that of the defendants. (2) That the payments by the limited company ought, on the doctrine of *Clayton's Case* (1), to be applied to the earliest items of the account on foot of which they were made.

At the trial, as to the first matter, the learned Judge left to the jury, without objection by the defendants, the question whether such an agreement had been made; and as to the second, he left to the jury the general question whether the sum sued for had been paid, in which the mode of appropriation was necessarily involved. The defendants insisted that he should have directed, as matter of law, that the sums paid should be appropriated to the earlier items. The jury answered both of these questions in the negative.

The defendants now move to change the verdict into one for the defendants, upon the ground that the learned Judge ought to have directed that the evidence proved, in fact, the novation relied on, and that no jury question arose in reference to it; and, in the alternative, they ask us to set aside the verdict and direct a new trial, upon the ground that the answer of the jury, as to payment, was against the weight of evidence.

The defendants appear to have contemplated, during the later months of 1910, the formation of a limited company, which was ultimately incorporated on the 4th January, 1911, under the name

(1) 1 Mer. 572.

K. B. Div. 1912. PITNER LIGHTING CO. *v.* GEDDIS AND PICKERING. Palles, C.B.

of the Simpitrol Lighting Company, Ireland, Limited, with a capital of £7000, in 7000 shares of £1 each, of which two shares were taken by the parties to the Memorandum of Association.

The object of the association was, *inter alia*, to adopt an agreement between the defendants and one Thompson, as a trustee for the company, to take over the defendants' business as electricians, with the benefit of, and subject to the liabilities incident to, existing contracts.

Before the incorporation of the company, the defendants purchased from the plaintiffs—I assume, in favour of the defendants, for the purposes of the business intended to be transferred to the company—the goods sued for; but it did not appear that any resolution of the company was passed taking over the business, or even that it had appointed any directors. By the agreement of the 18th of September, 1910, under which, as I have said, the jury found the goods had been supplied, the plaintiffs appointed the defendants sole agents for the sale of their specialities for the province of Ulster, and agreed to allow them 30 per cent. off the current prices of their goods, which were to be paid for by the defendants according to the manufacturers' terms of payment.

The defendants appear to have carried on business for some months before the incorporation under the name of the "Simpitrol Lighting Company," without the addition of the word "Limited," and in the account in the plaintiffs' books the prices of the goods were charged to this account. After notice of the formation of the company the plaintiffs continued to enter in this account the goods supplied to the company, the account being, as found by the jury, "kept as a continuous account, not distinguishing between liability for the period before and after the formation of the limited company"; and, some months after the incorporation, a copy of the account, the title of which had been (in the meantime) changed by the addition of the word "limited," was furnished to the limited company, and payments on foot thereof were afterwards received by the plaintiffs from the company.

It is mainly on these facts that the defendants rely as *conclusive* evidence of the novation. Assuming, as my brother Gibson held at the trial, but as to which I cannot say I am wholly free from doubt, that there was some evidence of this novation, I am clearly

of opinion that it was not conclusive. In a case such as the present the intention of the parties is one of the governing elements; and assuming, which I doubt, that there was evidence of an offer not only by, but legally binding on, the limited company, to take over the liability in substitution for that of the defendants, it was essential, to constitute a novation, that the plaintiffs should have accepted that offer—in other words, that they should have accepted the liability of the limited company for that of the defendants. I think that the change in the heading of the account, in which the prices of these goods were charged, from the "Simpitrol Lighting Company," without the word "limited" (under which the defendants must be taken to have traded up to the incorporation), to the Simpitrol Lighting Company, Limited, the furnishing of that account to the limited company, and the plaintiffs' acceptance of sums of money paid on that account, is *evidence* of the acceptance of the offer; but, in my view, it is evidence only, and not conclusive. Taking a negotiable security for a debt is stronger, or at least as strong, evidence on a question, such as this, of accepting payments on foot of such an account; and, therefore, the case is not stronger for the defendants than *Thompson* v. *Percival* (1), in which a creditor of a partnership, after notice to him of dissolution, and that the continuing partner alone should be looked to for his debt, took from him a negotiable security. The Court, after determining that the acceptance from one of two debtors of the negotiable security of one of them might be a good accord and satisfaction, instead of entering a verdict for the defendant, pursuant to the leave reserved, sent the case for a new trial. "It appears to us," says Lord Denman, C.J., "that the facts proved raised a question for the jury," whether there had been an agreement to accept in satisfaction.

Upon the first point raised, therefore, I am of opinion that my brother Gibson was right in not directing that there had been a novation.

The finding of the jury negativing the novation seems to me to conclude the second point, *i.e.*, as to the appropriation of the payments. Having regard to this finding, the account upon

(1) 5 B. & Ad. 925.

K. B. Div. 1912.

PITNER LIGHTING CO. v. GEDDIS AND PICKERING.

Palles, C.B.

which the payments of the limited company were made contained items of two classes, viz.—(1) items on which they were not liable; (2) items on which they were liable. Payments on such an account may and (in the absence of strong evidence to the contrary) ought to be attributed by a jury, as the jury have attributed them here, not necessarily to the earliest items of the account, but to those to which the persons paying were liable: *Burland* v. *Nash* (1).

The verdict should stand, and the present motion should be refused with costs.

Solicitors for plaintiffs: *Crawford & Lockhart.*
Solicitors for defendant: *Daniel O'Rorke & Son.*

J. M.

(1) 2 F. & F. 687.

Appeal. 1912.

Feb. 12, 14.

IN RE HARVEY, A BANKRUPT (1).

Bill of sale—Bankruptcy of grantor before first instalment accrues due—Property whether in his order and disposition with consent of grantee—Irish Bankrupt and Insolvent Act, 1857 (20 & 21 *Vict. c.* 60), *s.* 313—*Bills of Sale* (*Ireland*) *Act*, 1879, *Amendment Act*, 1883 (46 *Vict. c.* 7), *s.* 7.

The grantor in a bill of sale which was in the form prescribed by 46 Vict. c. 7, and was duly registered, was adjudicated a bankrupt before the first instalment under the bill of sale became due. The grantee thereupon took possession of the property comprised in the bill of sale, and remained in possession thereof until displaced later in the same day by the messenger of the Court of Bankruptcy.

Held, reversing the order of Boyd, J., that the property was not in the order and disposition of the bankrupt with the consent of the true owner. *In re Stanley* (17 L. R. I. 487) approved of and followed. *In re Hayes* ([1899] 2 I. R. 206) overruled. *In re Ginger; Ex parte London and Universal Bank* ([1897] 2 Q. B. 461) distinguished.

APPEAL from an order of Boyd, J., declaring that certain property claimed by the appellants was in the order and disposition

(1) Before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

of the bankrupt at the time of his bankruptcy with their consent, and directing the sale thereof for the benefit of the creditors of the bankrupt.

By a bill of sale in the statutory form prescribed by 46 Vict. c. 7, dated the 2nd June, 1911, this property, consisting chiefly of household furniture, was assigned by William H. Harvey to P. and H. Egan (the appellants) to secure a debt of £75, payable by two instalments of £37 10*s.*, payable on the 1st December, 1911, and the 1st June, 1912, respectively, with a proviso that the property was not to be liable to seizure for any cause other than those specified in section 7 of the Act. This bill of sale was duly registered. Harvey, the grantor, was adjudicated a bankrupt on the 15th August, 1911. On the 16th August the Egans put a bailiff in possession of the property, who remained in such possession until the messenger of the Court of Bankruptcy arrived and required the bailiff to withdraw.

On the motion of the assignees Boyd, J., made the order appealed from.

A. F. Blood, K.C., and *Stephen O'Brien*, for the appellants:—

In *In re Stanley* (1) a case decided shortly after the Bills of Sale Act, 1883 (46 Vict. c. 7), the late Judge Miller held that goods assigned by a bill of sale were not in the order and disposition of a bankrupt, if his retention of the possession of them as grantor was consistent with the terms of the bill of sale. In this case the adjudication took place months before the first instalment became payable. The law as established by that case was followed in Ireland for twelve years without question until the decision of the English Queen's Bench Division in *In re Ginger*; *Ex parte London and Universal Bank* (2), which Boyd, J., thought he was bound to follow in *In re Hayes* (3) and in the present case. But there is a remarkable distinction between section 44 of the English Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and section 313 of the Irish Bankrupt and Insolvent Act, 1857. The English reputed ownership clause is limited to "goods . . . in the possession of the bankrupt in his trade

(1) 17 L. R. Ir. 487.
(2) [1897] 2 Q. B. 461.
(3) [1899] 2 I. R. 206.

Appeal. 1912. *In re* ARVEY.

or business." Thus in England, notwithstanding the judicial construction applied in *In re Ginger* (1), there would or might be something as to which a bill of sale under the circumstances would be operative. This indeed is mentioned by Vaughan-Williams, J. (p. 465 of the report), as part of the *ratio decidendi*. But this ground of distinction appears to have been overlooked in *In re Hayes* (2). *Spackman* v. *Miller* (3), relied on in *In re Ginger* (1), has no application to the principle laid down in *In re Stanley* (4), for there the grantee could take possession by giving twenty-four hours' notice. That fact is the foundation of the judgments of Williams and Willes, JJ. The commentary of the two learned Judges on this case in *In re Ginger* (1) is scarcely warranted by the facts, the arguments, or the judgments.

R. Doyle, K.C., and *Denning*, for the assignees.

If bankruptcy was the only event upon which the grantee could take possession, there might be some foundation for the argument which has been addressed to the Court for the appellants. But there are several others. [Counsel read section 7 of the Bills of Sale Act, 1883.] Section 20 of the Bills of Sale Act, 1879, which protected goods granted by a bill of sale from the order and disposition clause, has been repealed, except in the case of absolute assignments, by the Act of 1883, which was avowedly passed for the purpose of indirectly abolishing bills of sale as securities in the hands of money-lenders. If the parties desired to guard against the risk of bankruptcy, it would have been easy to make the first instalment payable at a much earlier date. If a grantee agrees to a deferred payment, it amounts to a consent on his part to let the property remain in the possession of the bankrupt for the intervening period of time, and the grantees must take the risk of the grantor's bankruptcy during that period. The same observations as have been made as to bankruptcy would apply to the power to seize upon distraint.

(1) [1897] 2 Q. B. 461.
(2) [1899] 2 I. R. 206.
(3) 12 C. B. (N. S.) 659.
(4) 17 L. R. Ir. 487.

Appeal.
1912.

In re
HARVEY.

Feb. 14.

THE LORD CHANCELLOR:—

The law in Ireland upon the question raised in the appeal was elaborately considered in the year 1886, in the case of *In re Stanley* (1). The judgment was given by the late Judge Miller, and after an exhaustive examination of the statutes and authorities bearing on the subject, the learned Judge clearly and without qualification decided that certain hotel furniture granted on a bill of sale, dated June 16th, 1885, to the cabinetmakers who had made and provided it, in order to secure payment of its price, and meanwhile retained under the bill of sale in the possession of the grantor, was not covered by the reputed ownership section (313) of the Irish Bankrupt and Insolvent Act, 1857. The first instalment was payable on July 8th, 1885, but the owner was on his own petition adjudicated a bankrupt a few days before that date. A contest was raised, regarding the property in the furniture, between the grantees and the assignees in bankruptcy. A reference to the arguments of counsel will show that the contentions put forward on the present appeal were in all substance anticipated there, but the result was a decision to the effect I have indicated. Apart even from the special provisions in the Bills of Sale Act, 1883, the learned Judge found, in the circumstances, that the possession of the property by the owner could not be said to be by the consent and permission of the true owner. He described the grantees under bill of sale as restricted owners, who, unless in the events specified in section 7 of the Act of 1883, could not seize or take possession of the chattels comprised in the bill of sale, and were unable accordingly to give any consent or permission as to the possession of such chattels. For many years the law was regarded as settled in Ireland, by the decision in *Stanley's Case* (1). But there arose a case in England, *In re Ginger, Ex parte London and Universal Bank* (2), in which it was held that where the grantor in a bill of sale had become bankrupt before making default in payment of the sums secured, his possession of the goods assigned by it, under such circumstances that he continues to be the reputed owner thereof, is a possession by him with the consent

(1) 17 L. R. I. 487.
(2) [1897] 2 Q. B. 461.

Appeal. 1912. *In re* HARVEY. The Lord Chancellor.

of the true owner within the meaning of the English Bankruptcy Act, 1883, section 44 (2) (iii). In that case Ginger, who was a cattle dealer, had given to the Bank, as a security for an advance, a bill of sale over his furniture, stock, cows, calves, horses, &c. He gave, as a security for a further advance, a further bill of sale over his crops, tenant-right, and good-will of his farm. A bankruptcy petition was presented against Ginger, before any default was made by him in making payment under the bills of sale, and, on a question raised, it was held by the County Court Judge that the goods comprised in the two bills of sale on the bankrupt's farm in his trade or business, at the commencement of the bankruptcy, were in his possession, order, and disposition by the consent and permission of the true owner, and accordingly that the proceeds of them formed part of the bankrupt's estate, and were divisible among the creditors. As to the furniture in the house, not being in the possession of the bankrupt in his trade or business, the things affixed to the freehold, and the tillage, grass, and crops, the County Court Judge held that the doctrine of reputed ownership did not apply, and that the liquidator of the Bank (which was being wound up) was entitled to the proceeds in Court, representing these items. The difference made between the two classes of property, both comprised in the bills of sale, will be at once observed, and was due to the terms of the English statute, as compared with section 313 of the Irish Act of 1857. While under the Irish Act there is no limitation upon the character of the goods and chattels that would be affected by the provisions of sect. 313, the English Act (46 & 47 Vict. c. 52), by section 44 (2 (iii), provides that there should be divisible amongst a bankrupt's creditors all goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof. From that and the proviso in the sub-section it is manifest that in England the doctrine of reputed ownership applies only to goods in the trade or business of the bankrupt. Hence the distinction I have already pointed out in the judgment of the County Court Judge. On an appeal taken to the Queen's Bench Division, the decision of the County Court Judge was

affirmed, and it will be seen that Mr. Justice Vaughan-Williams (as he was then), at page 465, distinctly supported the discrimination made in the County Court. His words are, "The Bills of Sale Acts apply to all classes of persons. The reputed ownership clause of the Bankruptcy Act in effect only applies to traders. It speaks of the goods as being in the possession, order, or disposition of the bankrupt in his trade or business. It is therefore quite clear that, notwithstanding the Bills of Sale Act, and the construction which we may put on it, there will be many cases in which bills of sale will enure for the benefit of the grantee, despite the subsequent bankruptcy of the grantor." "It is plain," he said, "that with regard to such goods as the grantor includes in a bill of sale, and which are not goods in his trade or business, the bill of sale will continue to operate"; and then he deals with certain goods in the grantor's possession in his trade or business, of such a character that a custom may override the presumption of reputed ownership. But with that we have nothing to do in the present case. The learned Judge referred to *In re Stanley* (1), and, refusing to follow it, relied on *Spackman* v. *Miller* (2), which case, it will be found, was quoted before Judge Miller, just as was also quoted the case of *Freshney* v. *Carrick* (3), the latter being a main ground for the decision in *Spackman* v. *Miller* (2). Mr. Justice Wright, in agreeing with Lord Justice Vaughan-Williams, also said that *In re Stanley* (1) was inconsistent with *Spackman* v. *Miller* (2), and, on the authority of the latter, held that the consent of the true owner to the goods remaining in the possession of the grantor is given by the bill of sale itself.

The particular facts in *Spackman* v. *Miller* (2), decided in 1862, which make it a case singular in itself, were not gone into by either of the learned Judges. It was a case where the grantee could have taken possession at any time on twenty-four hours' notice, and at p. 678 of the report the importance paid to the fact by Mr. Justice Williams appears in the sentence—"Because where the mortgagee might at any time repossess himself of the goods

(1) 17 L. R. I. 487.
(2) 12 C. B. (N. S.) 659.
(3) 1 H. & N. 653.

Appeal. 1912. *In re* HARVEY. The Lord Chancellor.

upon giving twenty-four hours' notice, and does not choose to avail himself of the power, the goods are in substance in the possession of the bankrupt with the consent and permission of the true owner." Again, at p. 679, Willes, J., said :—" But he had all the time from the execution of the bill of sale to within twenty-four hours of the bankruptcy to acquire possession of the goods by giving notice." The facts in the present case, and, indeed, those in *In re Ginger* (1), did not correspond in that essential respect with the notable facts in *Spackman* v. *Miller* (2). The issue, then, for us in Ireland is whether we should follow the judgment of Lord Justice Vaughan-Williams and Mr. Justice Wright in 1897, or that of Judge Miller, which existed without question from 1886 down, at any rate, to the decision in the *In re Ginger Case* (1). I have called attention to the difference between the English and the Irish " reputed ownership " clauses; and the first striking result of applying the decision in England to our law will be to bring under section 313 of the Act of 1857, not only goods and chattels in a trade or business, but all goods and chattels of every kind without any limitation whatever. That point does not seem to me to have attracted attention in the only case reported in Ireland based on *In re Ginger* (1), so far as we were informed, namely, *In re Hayes* (3). It is right, however, to say that the goods comprised in the bill of sale in that case comprised only goods in the way of the grantor's trade or business, but the learned Judge did not, expressly at any rate, draw any distinction between goods in such trade or business and other goods, corresponding to that drawn both by the County Court and the King's Bench in England. And if the matter were adverted to, the distinction, I think, could not be drawn, for section 313 of the Irish Act makes no classification of the goods within its range. To deal with the goods in the present case, it is quite plain in England that, consisting for the most part of the furniture in the grantor's house, they would, even according to *In re Ginger* (1), remain the grantees', that is the appellants', property notwithstanding Mr. Harvey's bankruptcy. Of that there can be no

(1) [1897] 2 Q. B. 461.
(2) 12 C. B. (N. S.) 659.
(3) [1899] 2 I. R. 206.

doubt. Probably the same result would apply to the mare, trap, the harness, the cow, and the few other articles mentioned as in Mr. Harvey's yard, the only other chattels included in the bill of sale. Thus in England this bill of sale, on the authority relied on for the respondents, would stand good for the grantees on the bankruptcy of the grantor, and we are to see whether, under the Irish Act, the goods are to be disposed of for the general creditors. The bill of sale in this case was admittedly *bona fide*, and complied in every respect with the requirements of the Irish Act of 1883 (46 Vict. c. 7). It is in the precise form provided for by the schedule to the Act, and was duly registered. The first instalment was not payable under it till December, 1911; and on August 16th, 1911, Mr. Harvey was adjudicated a bankrupt, whereupon, without any delay, the appellants went to his house, and under the powers of section 7 of the Act seized the property comprised in the bill of sale, and held it for a few hours before the arrival of the bankruptcy messenger upon the scene. That was the first moment the grantees could take possession of, much less seize, the goods, so that there was no laches or negligence on their part. What is the answer to the appellants' claim? *In re Ginger* (1), and nothing else, though in like circumstances I think it must be admitted it would in England be no answer at all. No attempt was made, so far as I understand the argument, to explain section 7 of the Act of 1883, providing that the parties to the bill of sale could not seize or take possession of the assigned chattels, except in the events specified, the second named being to the effect that he could seize and take possession of them in the event of the grantor becoming a bankrupt. That is the plain meaning of the section, and I heard no other suggestion as to its meaning. The equivalent words in the English statute 46 Vict. c. 43, section 7, even as regards trade or business goods, were not, so far as the matter was laid before us, or I could discover, discussed in any reported case, and it is not possible for me to say what special reliance the English Court may have placed on the provision in the Bankruptcy Act relating to goods in a man's trade or business. I am not going to occupy time by travelling over the ground relating to the pro-

(1) [1897] 2 Q. B. 461.

Appeal. 1912. *In re* HARVEY. The Lord Chancellor.

tection given to grantees of bills of sale under the Irish Bankruptcy Acts. It was traced clearly and definitely by the learned Judge who decided *In re Stanley* (1), and with what he said I personally fully agree. But as to section 7 of the Act of 1883, and dealing with a bill of sale given as a security for the payment of money, I cannot but think that the provisions of the section are plain and incapable of misapprehension. It is said that the grantee in some way or another should guard the public against the inference that the goods were available for their debts. This bill of sale was duly registered, which is the only public notice that could be effectively given, and none other was directed by the Act. When asked to be specific in their suggestion, I do not remember what practicable or reasonable course the learned counsel for the respondents were able to suggest. In my judgment no steps other than those taken by the appellants were necessary, and I cannot escape the conclusion that any other construction than that which we have decided to place on section 7 of the Act of 1883, in relation to the event of the grantor's bankruptcy, would be a denial of the distinct security intended to be given by the Act to *bona fide* grantees under regular bills of sale. It is inconceivable that if the Legislature means that in the case of bankruptcy the grantee could only put in a claim as creditor in the bankruptcy proceedings, the section should take the form it does, providing that, in such event, the grantees could seize and take possession of the goods. The section, in my judgment, wholly justifies the action of the appellants. There was no answer, in my opinion, to their claim, and the appeal accordingly ought to be allowed with costs.

HOLMES, L.J.:—

William H. Harvey being indebted to P. and H. Egan in the sum of £75, assigned by indenture of the 2nd June, 1911, to them a quantity of household furniture as security for the payment of the debt by equal sums of £37 10*s.*, the first to be paid on the 1st December, 1911, and the second on the 1st June, 1912, subject to a proviso that the chattels so assigned should not be

(1) 17 L. R. I. 487.

liable to seizure, or to be taken possession of by P. and H. Egan for any cause other than those specified in section 7 of the Bills of Sale (Ireland) Act, 1879, Amendment Act, 1883.

This assignment was duly registered as a bill of sale, and it is admitted that it is in every respect a legal document. Harvey was adjudicated a bankrupt on the 15th August last, and on the following day a bailiff of the Egans took possession of the assigned chattels, and was in such possession when the Court messenger arrived for a similar purpose. The assignees having brought the matter before Boyd, J., it was declared that the bankrupt, at the time he became bankrupt, had, by the consent and permission of the true owner, in his possession, order, or disposition, the goods and chattels comprised in the bill of sale, of which goods and chattels the bankrupt was the reputed owner; and accordingly a sale thereof was ordered for the benefit of Harvey's creditors. The present appeal is from this declaration and order; and its result depends upon the construction of four sections of three statutes. The first of these is section 313 of the Irish Bankrupt and Insolvent Act, 1857, which provides that if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy. This well-known provision is clear in its language; and I confine myself to pointing out that it extends to goods and chattels of every kind, and that what is required to make it operative is possession, order, or disposition by the *consent and permission* of the true owner. The next statute to be referred to is the Bills of Sale (Ireland) Act, 1879, the principal object of which is to provide for the attestation and registration of bills of sale and for avoidance of those that are unregistered. I need not detail the provisions on this subject, as the legality of the bill of sale before the Court cannot be disputed; but I must quote section 20, as it has an important bearing on the question under consideration. It enacts: "Chattels comprised in a bill of sale, which has been and continues to be duly registered under this Act, shall not be deemed to be in the possession, order, or disposition

Appeal. 1912.

In re HARVEY.

Holmes, L.J.

of the grantor of the bill of sale within the meaning of the Irish Bankrupt and Insolvent Act, 1857, or any Act altering or amending the said Act."

The Act of 1879 was amended by 46 Vict. c. 7, which I regard as the statute upon the construction of which our decision depends. It is confined by section 3 to bills of sale given by way of security for the payment of money. I think that the effect of this amending Act, taken as a whole, is to diminish the value to grantees of assignments of this character. This is shown by several of its provisions, and especially by its repealing the 20th section of the previous Act, which I have just quoted. At the same time I am of opinion that section 7 was intended to protect, in certain circumstances, from the reputed ownership provision of the Act of 1857, the grantee under a bill of sale of goods and chattels remaining in the possession of the grantor. Section 7 enacts that "personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

(1) "If the grantee shall make default in payment of the sum or sums of money thereby secured at the time therein provided, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security."

Stopping here and confining myself for the present to this provision, I should say that, in construing it, regard ought to be had to the object and usual form of these documents when given as a security for the payment of money. Although it is in form an immediate assignment of the chattels, and possession might be taken at once, it is intended in the absence of certain circumstances that the money shall be paid at a certain time, such circumstances and time being usually specified in the instrument. Now, in cases in which the grantee being entitled to take possession at any time allows the grantor to remain in possession, the latter's possession obviously arises from the consent and permission of the true owner. But when a statute enacts that where a time is provided for payment the chattels shall not be liable to be taken possession of by the grantee until the grantor makes default in payment at such time, it seems to me that the grantor is not in possession by

the permission of a person who can neither give nor withhold permission. Knowing the view expressed by two Judges of the King's Bench Division in England, to which I shall presently refer, I state my opinion of the effect of sub-section (1) of section 7, taken by itself with some hesitation; but whatever may be my doubt when I confine myself to that sub-section, it is wholly removed by sub-section (2).

If this provision be read in connexion with what goes before, we have an enactment that personal chattels assigned under a bill of sale shall not be liable to be taken possession of by the grantee for any cause other than (1) the cause already discussed, and (2) if the grantor shall become a bankrupt. These words are quite unintelligible to me unless, whatever be the effect of sub-section (1), those chattels can be taken possession of if and when the grantor becomes a bankrupt. Reading the two sub-sections together in the way most favourable to the assignees in bankruptcy, they can only mean that even if until the time of payment the chattels may come within the reputed ownership provision, the grantee is entitled to take possession of them if and when the grantor's bankruptcy takes place.

I have so far discussed the section apart from decided cases. I now turn to authority. In December, 1885, a case supposed to be identical in its facts, and to raise the same questions as the present case, came before Judge Miller, an accomplished lawyer having great experience in Irish bankruptcy law, who gave an elaborate judgment deciding it in favour of the grantee in the bill of sale for substantially the same reasons as I have stated. It was afterwards discovered that a circumstance had been overlooked in the argument in that case that distinguished it from the present. But the judgment is no less an authority on the assumed facts, and was acted on in Ireland down to 1899. The next decision is that given by two Judges of the King's Bench Division in *In re Ginger* (1). The English Bills of Sale Act contains a section identical with section 7 of our Act and the facts of the case were identical with those in the present case, except that the chattels assigned were not household furniture, but goods at the commencement

(1) [1897] 2 Q. B. 461.

Appeal. 1912. *In re* HARVEY. Holmes, L.J.

of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business. It was held in that case that the grantee of the bill of sale, by agreeing therein that payment was to be made at a specified date, thereby gave his consent and permission to the grantor remaining in possession until that date. It was said that he was under no obligation to take a bill of sale at all, and that if he did take this form of security he could have made the debt payable immediately; but not having done so, he must be held to have assented to the grantor remaining in possession, and permitted him to do so.

I have already stated my reasons for not accepting this proposition in considering the effect of sub-section (1). But what is the meaning of sub-section (2)? It is to be observed that if a case similar to the present were to arise in England, the grantee would be entitled on the bankruptcy to take possession of the goods, inasmuch as the reputed ownership provision in the English Act (Bankruptcy Act, 1883, section 44) is confined to goods in the possession of the bankrupt in his trade and business.

The English Judges pointed out that there was ample scope for the operation of sub-section (2) where chattels other than goods in the grantor's trade and business were assigned by a bill of sale.

The similar provision in our Bankruptcy Act of 1857 extends to goods and personal chattels of every kind; and counsel for the assignees failed to satisfy me that there was any class of cases in Ireland to which sub-section (2) of section 7 would apply if we were to follow the English decisisn. The sub-section would be wholly valueless, and, therefore, no reason can be given for its introduction.

Judge Boyd, who had been acting on Judge Miller's construction of the statute of 1883 for fifteen years, as he was bound to do, in the year 1899, in the case of *In re Hayes* (1), followed *In re Ginger* (2), expressing his personal agreement with that decision. The only other authority is a repetition by one of the Judges who heard *In re Ginger* (2) of his reasoning therein a few years later. I have stated the grounds for my not being able to adopt that reasoning, which I admit would logically apply

(1) [1899] 2 I. R. 206. (2) [1897] 2 Q. B. 461.

to the question now under consideration, although the result of a case in England, precisely similar in its facts to the present, would be that now arrived at by this Court. I may add that I have considered *Spackman* v. *Miller* (1) and the other cases mentioned in *In re Ginger* (2), but I have gained no assistance from authorities decided under statutes and arising under states of circumstances different from those with which we are dealing.

CHERRY, L.J.:—

There is no dispute as to the facts of this case; and we are called upon to decide a pure question of law, which is of great importance in the administration of the Bankruptcy Acts.

A debtor, upon whom a writ has been served, in order to prevent a judgment being marked against him, gives security for payment of the debt by a bill of sale of his household furniture and effects. Half the amount of the debt is made payable six months after the date of the execution of the deed, the other half at the expiration of one year from the same date. The bill of sale is in the statutory form, is regular in every respect, and is duly registered. The debtor retains possession of the goods mortgaged, in accordance with the terms of the mortgage deed; and before the time fixed for payment of the first instalment of the debt has arrived, or anything has occurred to justify a seizure of the goods by the grantee, becomes bankrupt. Are the goods, under these circumstances, to be deemed to be in the "possession, order, or disposition" of the bankrupt "by the consent and permission of the true owner thereof," within the meaning of section 313 of the Irish Bankruptcy Act, 1857? If so, the Court may order them to be sold for the benefit of the creditors in the bankruptcy matter.

The authorities upon the point are conflicting, and cannot possibly be reconciled. In the case of *In re Stanley* (3), where the facts were exactly as they are in the present case, Miller, J., after a long and elaborate judgment, in which he reviewed the earlier authorities, arrived at the conclusion that the possession of

(1) 12 C. B. (N. S.) 659.
(2) [1897] 2 Q. B. 461.
(3) 17 L. R. Ir. 487.

Appeal. 1912. *In re* HARVEY. Cherry, L.J.

the chattels by the bankrupt being consistent with the terms of the deed, such chattels could not be held to be in his possession with the consent of the "true owner"; and he therefore held that they were not liable to be sold for the benefit of his creditors in the bankruptcy. This decision was pronounced two years after the passing of the Bills of Sale Act, 1883, and was mainly based on the terms of the 7th section of that Act. The view of the learned Judge appears to have been that inasmuch as that section expressly prohibited all grantees under bills of sale, given by way of security for the payment of money, from taking possession of the goods, except for one of the five causes specified in the section itself, such grantees were not in a position to give any "consent" or "permission" as to the possession of the goods, and therefore the terms of section 313 of the Bankruptcy Act, 1857, could not have effect.

If this be the *ratio decidendi*, as I think it is, of the case, it would follow as a logical consequence that once any event happened which enabled the grantee under the bill of sale to take possession of the goods, and he omitted to do so, the grantee would no longer be protected, and the goods under these circumstances might be held to be in the order and disposition of the bankrupt, with the consent of the true owner. Mr. Blood, who appeared for the grantee, under the bill of sale in the present case expressly admitted that this was so, and he based his whole case upon the fact that no event had happened which would justify seizure by the grantee.

The question came up for decision in England, a few years later, before a Divisional Court, in the case of *In re Ginger* (1). The "reputed ownership" section of the English Bankruptcy Act, 1883 (section 44, sub-sect. iii), is similar in terms to the Irish section, except that it only applies to goods in the possession, order, or disposition of the bankrupt "in his trade or business." The case of *In re Stanley* (2) was cited, but the Court there refused to follow it, deeming it inconsistent with an earlier English case of *Spackman* v. *Miller* (3), which they held themselves bound to

(1) [1897] 2 Q. B. 461.
(2) 17 L. R. I. 487.
(3) 12 C. B. (N. S.) 659.

follow. With every respect for the opinions of the two learned Judges who decided *In re Ginger* (1), I cannot see that there is any inconsistency between *In re Stanley* (2) and *Spackman* v. *Miller* (3), for not only was the latter case decided before the Legislature placed the special restrictions upon the right of the grantee to take possession of the goods which formed the *ratio decidendi* of *In re Stanley* (2), but the ground of the decision of *Spackman* v. *Miller* (3) itself was that the bill of sale in that case contained a clause enabling the mortgagee to call for the payment of the principal secured on twenty-four hours' notice, and if the money was not then paid, empowered him to seize the goods. The Court held that his not availing himself of the power to take possession of the goods was in substance a consent to their remaining in possession of the bankrupt (4). Thus explained, the decision of *Spackman* v. *Miller* (3) appears to be much more consistent with *In re Stanley* (2) than it is with *In re Ginger* (1).

However, when the question again arose before Boyd, J., in this country in *In re Hayes* (5), he followed *In re Ginger* (1) in preference to *In re Stanley* (2); and, as the facts in the present case are precisely similar, he, of course, followed his own previous decision, and held that the goods mortgaged were in the order and disposition of the bankrupt, notwithstanding the fact that no default had been made, and no right had accrued to the grantee to take possession. The present appeal is, therefore, in substance an appeal from the judgment of Boyd, J., in *In re Hayes* (5).

In this conflicting state of the authorities I have come to the conclusion that the decision of Miller, J., in *In re Stanley* (2) is correct in point of law, and that it is more consistent with the terms of section 7 of the Bills of Sale Act, 1883, than *In re Ginger* (1) is. It is absurd to speak of consent where there is no power to refuse consent, and, until some default has been made by the grantor which enables the grantee to take possession, the possession of the grantor cannot with truth be said to be "*by the consent and permission*" of the grantee. His possession is not by the per-

(1) [1897] 2 Q. B. 461.
(2) 17 L. R. I. 487.
(3) 12 C. B. (N. S.) 659.
(4) See judgment of Williams, J., 12 C. B. (N. S.), at p. 678.
(5) [1899] 2 I. R. 206.

Appeal. 1912.

In re HARVEY.

Cherry, L.J.

mission of anyone. It is legal possession, as of right, in accordance with the statute.

Again, the 7th section of the Bills of Sale Act, 1883, expressly enables possession to be taken "if the grantee shall become a bankrupt." This provision, as has been already pointed out by the other members of the Court, would become nugatory if the decision below were to be upheld, as in every case the order and disposition clause would operate, and seizure by the grantee could never be effectually made. This argument was pressed upon the Court in *In re Ginger* (1), and the answer given by both the learned Judges there was that, inasmuch as the English reputed ownerships clause only applies to traders, there were many cases in which seizure could be made under the 7th section. "No doubt," says Wright, J. (2), "section 7 of the Bills of Sale Act, 1882, recognizes that a bill of sale is enforceable in bankruptcy; but that can only mean to give the grantee of a bill of sale an effective power of seizure in cases where the reputed ownership clause does not apply." I think that it is not an unwarrantable assumption to make that if the reputed ownership section of the English Bankruptcy Act, 1883, had been identical in its terms with the 313th section of our Act of 1857, the decision of *In re Ginger* (1) would have been different.

I, therefore, agree that the order of the Court below should be reversed.

Solicitor for the appellants: *William T. Conway.*
Solicitors for the respondents: *Hoey & Denning.*

W. G.

(1) [1897] 2 Q. B. 461. (2) At p. 467.

MARY MALONE, CATHERINE MALONE, ELIZABETH MALONE, AND ELLEN MALONE *v.* THE BELFAST BANKING COMPANY, LIMITED (1).

K. B. Div. 1911. June 6, 7, 8, 9, 29.

Appeal. 1912. Feb. 1, 2, 5, 6, 7, 19.

(1910. No. 12916.)

Principal and agent—Banker and customer—Banker and banker's agent—Dual capacity of agent as branch manager and trustee—Constructive knowledge of bank of agent's fraud—Liability of bank to customer in respect of agent's fraud.

The defendants, an incorporated banking company, employed D. as manager of a branch bank at C., where D. kept his own private account. M., a customer of the bank, devised his house to his wife, and bequeathed a policy of insurance to the plaintiffs, and appointed D. his executor. M. died in 1886, at which date the house devised to his wife was subject to a mortgage for £300, and the said policy of insurance was vested in the defendants as security for an overdraft of M., the latter on M.'s death amounting to £161 13*s.* 10*d.* D. proved the will, and on the defendant company receiving the proceeds of M.'s policy of insurance, amounting to £690, this amount was placed to M.'s credit in the bank. Shortly afterwards D. drew out on his own cheque the balance remaining after payment of M.'s overdraft, and lodged it to the credit of his own private account in the bank, which was then largely overdrawn, M.'s account being closed.

In 1887, the sum of £300, portion of plaintiffs' trust funds, was invested by D., with the consent of plaintiffs, on a transfer to D. of the mortgage on the house devised to M.'s widow; and the latter, who had a private current account in the bank, thereafter paid by her own cheque the yearly interest on the mortgage, the cheques being handed each year by one of the plaintiffs to D. to add to the money in the bank; these cheques were also in each year placed to D.'s private credit in the bank, thereby reducing his overdraft for the time being. In 1893 M.'s widow borrowed from her daughters £134, and this transaction was carried out by D. entering £134 to her credit in her bank pass-book, and by her and her son, on the requirement of D., signing two undated promissory notes in the ordinary form used by the bank, for £100 and £34 respectively, D. saying that he required this to be done "to keep the bank safe, and himself safe."

(1) In the King's Bench Division, before THE LORD CHIEF BARON and KENNY, J.

K. B. Div. 1911. MALONE *v.* BELFAST BANKING CO.

In 1901 M.'s widow, who owned a deposit receipt for £300 in the bank, made a present to the plaintiffs of this sum, and endorsed the deposit receipt to them; one of the plaintiffs brought the deposit receipt to the bank, and handed it across the counter to a junior official, D. being absent, and told him they wished it added to their other money in the bank, On the same day the deposit receipt was lodged to the credit of D.'s private account, thereby reducing a large overdraft.

D. each year furnished the plaintiffs with an account, purporting to show the balance due to plaintiffs, and adding interest at a fixed rate, and interest on the mortgage; the last of such accounts was dated 1st January, 1909. D. left the defendants' employment in 1909, when his own private account was largely overdrawn (the overdraft, however, being secured to the bank), and died shortly afterwards.

In an action by the plaintiffs against the defendant company to recover the amount named in the account last furnished as due on an account stated and settled, and for money had and received for the plaintiffs' use.

Held, that the defendants were liable.

NEW TRIAL MOTION.

The action was brought to recover the sum of £1535 6*s.*, whereof the sum of £1476 was claimed as due and owing to plaintiffs for moneys payable by the defendants to plaintiffs for moneys found to be due from the defendants to the plaintiffs on accounts stated and settled between them on the 5th day of February, 1909, and for money had and received by the defendants for the use of plaintiffs. The particulars were as follows:—1909, 1st January:—Balance due to plaintiffs this day admitted by the defendants' agent and manager, the late John George Donaldson, of the Belfast Banking Co., Cookstown, under his hand, £1476 5*s.*; interest to 1st January, 1910—£59 1*s.*; total, £1535 6*s.*; further interest till payment. The defendants, by their defence, traversed the several averments in the statement of claim, and pleaded that J. G. Donaldson was not acting as agent and manager for the defendant company when he made the admission (if any) referred to in the statement of claim; that the said J. G. Donaldson had no authority as manager and agent for them to make such admission, but that same was made (if at all) by him outside the scope of his authority as manager and agent for the defendant company, and solely in his personal capacity or as executor of the will of one Peter Malone, deceased. They

further pleaded that the plaintiffs' claim was barred by section 20 of 16 & 17 Vict. c. 113.

The action was tried before the Honourable Mr. Justice Dodd and a special jury, on the 8th and 9th days of May, 1911, when the following facts were proved. J. G. Donaldson had been for upwards of thirty years the manager of the defendant company's branch bank at Cookstown, and continued to act as such manager up to the year 1909. The bank and the manager's residence formed one building, and Donaldson kept his own private account in the bank.

Prior to the year 1886, one Peter Malone was a customer of the bank at Cookstown, where he had a current account. The said Peter Malone, by his will, dated the 29th March, 1881, *inter alia* devised his house and licensed premises, where he carried on business, to his wife, Catherine Malone, for her life, with remainder to his son Robert; and he thereby bequeathed a policy of insurance for £500 on his own life to his five daughters, including the four plaintiffs, with benefit of survivorship; this sum the testator directed his executors (of whom Donaldson was named as one) to invest for his daughters and each of them "until the death or marriage of my wife, or until the marriage of my said daughters, or until they commence business on their own account, whichever event shall first happen, but in no case until they personally attain the age of twenty-one years."

Peter Malone died on the 29th June, 1886, and his said will was proved by J. G. Donaldson alone of the executors named in it.

At the date of Peter Malone's death, the premises devised by him to his wife were subject to a mortgage for £300, then vested in one Samuel Brown, and the policy of insurance bequeathed to the testator's daughters was vested in the defendant company under an assignment of the 2nd August, 1867, as security for an overdraft, which overdraft at the date of Peter Malone's death amounted to £161 13*s.* 10*d.*

On the death of Peter Malone a sum of £690 14*s.* 10*d.*, representing the proceeds of the said policy of insurance, was paid to the bank as assignees of the said policy of insurance, and was credited to Peter Malone's account, thereby extinguishing his overdraft

K. B. Div. 1911.

MALONE v. BELFAST BANKING CO.

and leaving a balance to credit of £529 1*s*. This balance was by a cheque signed by Donaldson, as executor, paid out to the latter on the 23rd October, 1886, and on the same day Donaldson lodged the sum of £303 6*s* 5*d*. to the credit of his own private account in the bank, which was then overdrawn very largely in excess of a limit of £200 allowed him by the defendant company. On the 26th October Donaldson lodged a further sum of £313 2*s*. 5*d*. to the credit of his own private account in the bank. Peter Malone's account in the bank was then closed, and no new account was opened in Donaldson's name as executor or otherwise.

On the 20th October, 1887, the sum of £300, portion of the plaintiffs' trust funds, was, with their consent, and that of their mother, Mrs. Malone, invested by Donaldson on a transfer of the mortgage debt of £300 on the house and premises devised by Peter Malone to his wife, and the said mortgage was on that date vested in Donaldson. Interest on the said mortgage debt was thenceforth, during her lifetime, paid regularly by Mrs. Malone, who drew a cheque each year for £12, and gave it to the plaintiff, Mary Malone, and the latter handed the cheques to Donaldson to be added to the plaintiffs' money in the bank. A number of lodgment-dockets, in the ordinary form used by the defendant company, and headed "Belfast Banking Company, Limited, Cookstown Branch," were put in evidence showing lodgments for the credit of Donaldson, "per self," and which included the several sums of £12 so paid by Mrs. Malone on foot of the interest on the mortgage, these sums appearing in the particulars endorsed on the dockets of the sums lodged, in some cases after the name "Miss Malone," in others after the names "P. Malone, deceased"; "P. Malone," "P. M. D.," or "Malones."

The plaintiff, Mary Malone, deposed to a conversation between her and Donaldson in or about the time of the transfer of this mortgage, in the course of which, referring to the proceeds of the policy, she asked Donaldson, "Is that the money we now have lying in the bank?" To which Donaldson replied, "Yes."

In the month of August, 1893, Mrs. Malone, the mother of the plaintiffs, who also had a private account in the bank, she

being in need of money to repair her house, asked her daughters for the loan of £134. Mary Malone accordingly went to the bank with her mother's pass-book, and on her explaining what was required, Donaldson entered the sum of £134 in Mrs. Malone's pass-book to the latter's credit. He then told Mary Malone that it would be necessary for Mrs. Malone and her son to sign two promissory notes, one for £100 and one for £34, stating to her that "he wished to keep the bank safe, and himself safe," and two undated bills for the said amounts, in the form used by the bank, were signed by Mrs. Malone, and given to Donaldson. This sum of £134 was subsequently repaid by Mrs. Malone, and appeared to the credit of plaintiffs in the accounts hereinafter mentioned.

On the 17th August, 1898, Mrs. Malone, the mother of the plaintiffs, had lodged in the bank a sum of £300 on a deposit receipt in the names of "Mrs. Catherine Malone and Miss Ellen Malone, Cookstown, payable to either, or their survivor"; this deposit was headed, "not transferable." In September, 1901, Mrs. Malone wished to make a present to her daughters, the plaintiffs, of the moneys so deposited, and accordingly, on the 7th September, 1901, she handed it to her daughter, Ellen Malone, who brought it to the bank. Donaldson was not present on this occasion, and Ellen Malone handed the deposit receipt across the counter to a junior official of the bank, and told him the money was to be added to the plaintiffs' other money in the bank. The deposit receipt was endorsed by Mary Malone, who signed her mother's name, and by Ellen Malone. It was further endorsed with the words "cash for investment," and the words "Principal, £300; Interest, £13 4*s*. Total, £313 4*s*. Paid 7th September, 1901; examined by J. H. S.," the words "cash for investment" and the figures being in Donaldson's handwriting, and the initials "J. H. S." being those of a junior official in the bank. The deposit receipt remained in the custody of the bank, and on the same day Donaldson made out a lodgment docket of lodgments to his own private account, including a lodgment of the said sum of £313 4*s*.

A large number of accounts furnished annually by Donaldson

K. B. Div. 1911.

MALONE v. BELFAST BANKING CO.

to the plaintiffs was put into evidence, the first of which was dated the 17th July, 1888, and was in the following form:—

Dr.				Cr.			
1886	£	s.	d.	1886	£	s.	d.
Oct. 26. Amount held by Bank out of Life Policy to pay overdraft, ...	100	0	0	Oct. 26. Life Policy and Profits, ...	690	14	10
1887				Int. (Bank dep.) to 1st Jan. 1887, £1 10 8			
Nov. 1. William Brown's Mortgage paid off, ..	300	0	0	Int. £300 to 1st Nov. 1887, .. 3 4 1			
Premium on Fire Policy,	0	11	6	Fixed rate of £200 3 per cent. to 1st Jan. 1888, 8 14 0	13	8	9
1888							
Jan. 1. Balance, ...	303	12	1				
	£704	3	7		£704	3	7

Amount due by Mrs. Malone & Son to trustees of daughters, viz.,		£303	12 1
£100 with interest, say at 2 per cent. up to 1st August, 1888, ..		104	0 0
One half year's interest on £300 mortgage on premises to 1st May, 1885, ...		6	0 0
		£413	12 1
Brought down, ..	£413 12 1		
Mortgage, ..	300 0 0	£713	12 1

(Signed), J. G. DONALDSON.

17*th July*, 1888.

On the 30th January, 1891, Donaldson furnished the plaintiffs with an account (which was written on bank paper and stamped Cookstown Branch) headed "Peter Malone's daughters' account," and containing the following items:—

Balance to credit, 31st December, 1890, ..	£455	0 0
Interest on £300 mortgage paid by trustees to 1st November (one year), ...	12	0 0
Interest on £455 for one year to 31st December, 1890, ...	13	13 0
Credit to 31st December, 1890, ...	£480	13 0

(Signed) J. G. DONALDSON.

On the 1st January, 1892, Donaldson furnished an account headed, "Statement Peter Malone, deceased. Executor's account," and containing the following items :—

"Jan. 1. 1891. Balance as furnished, ..	£480	13	0
„ „ 1892. Interest 12 months, ..	14	7	0
„ „ „ Interest on mortgage loan to 1st November, 1891, ...	12	0	0
	£507	0	0

"(Signed) J. G. DONALDSON."

On the 1st January, 1894, Donaldson furnished an account, headed, "Cookstown Branch, Repres. Peter Malone, deceased (daughters)," which included the item, "Loan for improving house, August, 1893, £134."

On the 1st January, 1895, Donaldson furnished an account as follows :—

"*Peter Malone, deceased (daughters' Trust Account).*

"1894.						
Jan. 1.	Balance in hands, ...			£426	0	0
Mar. 27.	Part £134 loan repaid, ...			34	0	0
1895.						
Jan. 1.	Interest to date ..	£13	10 0			
	„ on £300 mortgage, to 1st Nov. 1894, ..	12	0 0	25	10	0
				485	10	0
	Bill repaid, ...			100	0	0
				£585	10	0

"J. G. DONALDSON.

"This will do until the end of year, when I will give you a new account."

K. B. Div. 1911.

MALONE v. BELFAST BANKING CO.

On the 10th October, 1895, Donaldson sent the following letter:—

"All letters to be addressed
"to the Manager.

"Belfast Banking Co., Ltd.,
"Cookstown Branch,
"10*th October*, 1895.

"DEAR MISS MALONE,

"I had not time to make you out a new statement to-day, but shall do so some day soon, and bring it up to you. I enclose the old bill now.

"Yours sincerely,

"J. G. DONALDSON."

Similar accounts were produced which had been furnished by Donaldson for the years 1895, 1897 (Jan. 1st), 1897 (Dec. 31st), 1898, and 1899, headed in various ways—"Peter Malone's trust"; "Statement of account, executors P. Malone, deceased"; "Misses Malone, statement of account"; "Peter Malone, trustee's account"; and "Executors P. Malone, deceased, in account with Misses Malone."

The account furnished for the year 1901 was headed "P. Malone, deceased, trustee's account," and signed "J. G. Donaldson, executor and trustee." This account commenced with a balance of £740, and after adding interest on the £300 mortgage and interest on balance to 31st December, 1900, it contained the item:

"1909.

"Sept. 7. Deposit receipt and interest, .. £313 4 0."

In the succeeding accounts (which were headed in one instance, "Trustees, Misses Malone," and in the others, "Executors, P. Malone, deceased") the amount of the deposit receipt was included in the balance to credit, and these accounts were all similar in form to that sued upon in the action, which was as follows:—

"*Executors of Peter Malone, deceased. Account for year* 1908.

"1908.							
"Jan. 1.	Balance to credit				£1421	10	0
,,	Interest on £300 mortgage, one year to 1st Nov., 1898, ..	£12	0	0			
,,	Interest on balance £1421 10s. one year to 1st Jan., 1909, ..	42	15	0	54	15	0
					£1476	5	0

"(Signed) J. G. DONALDSON."

Mary Malone, one of the plaintiffs, stated in her evidence that she knew these documents were accounts of her father's executor; that she thought Donaldson was acting as trustee and as bank manager, and that as bank manager "he could deal with the money."

Donaldson left the employment of the defendant company in the year 1909, when his private account in the bank was overdrawn to the extent of £967, which was, however, covered by security held by the defendant company; Donaldson died in the year 1910, insolvent.

One of the five daughters of Peter Malone had died many years before this action was brought.

The defendant company was incorporated under the Companies Acts, and was precluded by its constitution from acting in the capacity of executor or trustee.

The following were the questions submitted to the jury, and the answers thereto:—

1. Was the deposit receipt entrusted by the plaintiffs to the defendants in a banking transaction for the purpose of having invested in the bank the proceeds of the said receipt? Answer—"Yes."

2. Were the moneys that came to the plaintiffs as beneficiaries under their father's will, after their father's estate was administered, entrusted to the bank to be invested in the bank at a fixed rate? Answer—"Yes."

K. B. Div. 1911.

MALONE v. BELFAST BANKING CO.

3. Were the sums of money of £12 a year paid to the bank to be invested in the bank at a fixed rate? Answer—"Yes."

4. Did Mr. Donaldson, as manager of the defendants' branch at Cookstown, represent to the plaintiffs that their moneys had been invested in the Bank at a fixed rate of 3 per cent. per annum? Answer—"Yes."

5. Did the plaintiffs act on said representation? Answer—"Yes."

6. Was the said representation false in fact? Answer—"Yes."

7. Was the representation fraudulent? Answer—"Yes."

8. Did the plaintiffs suffer loss thereby? Answer—"Yes."

9. Was Donaldson, in his transactions with the plaintiffs, acting (*a*) solely as a trustee? or (*b*) solely as bank manager? or (*c*) partly as trustee? Answer—"Yes"; and partly as bank manager? Answer—"Yes."

10. Was it his position as bank manager that enabled Donaldson to appropriate to his own use the plaintiffs' moneys? Answer—"Yes."

11. Had the bank notice that the moneys, the subject-matter of this action, were the moneys of the plaintiffs? Answer—"Yes."

Upon these findings the learned Judge entered judgment for the plaintiffs for £1535 6*s.* and costs.

The defendants applied to the King's Bench Division for an order that this verdict and judgment should be set aside, and judgment entered for the defendants, or in the alternative for a new trial.

The Right Hon. J. H. Campbell, K.C., Henry, K.C., and *Muldoon,* appeared for the plaintiffs.

Ronan, K.C., Chambers, K.C., Bates, K.C., Wylie and *Malone,* appeared for the defendants.

The arguments were similar to those in the Court of Appeal, reported *infra.*

PALLES, C.B. :—

This is an application to change the verdict had for the plaintiffs for £1535 6*s.* into a verdict for the defendants, or for a new trial.

The action, which I treat as one for money had and received by the defendants for the plaintiffs' use, is brought by the *cestuis que trust* of a fund which originated in a bequest in the will of their father, Peter Malone, to recover from the defendants, a Banking Company, the moneys, the subject of the trust, which they allege were received by the Banking Company through the plaintiffs' trustee, one John George Donaldson, who was also manager of the Cookstown Branch of the defendants' bank, and were permitted by the defendants to be drawn out of the bank in breach of trust. The amount of the verdict is made up of three sums, or classes of sums of money, and interest accumulated at 3 per cent., with yearly rests. These sums are, firstly, portion of a sum secured on a policy of insurance; secondly, the amount of a deposit receipt; thirdly, twenty sums of £12 each, the annual interest on a mortgage for £300. The jury have found that all these sums were received by the defendants, and the questions argued were—(1) Whether there was evidence to support these findings? and (2), if so, whether the verdict was against the weight of evidence?

The trust was constituted by a bequest in the will of Peter Malone, the plaintiffs' father, dated the 29th March, 1881, whereby he bequeathed a policy of insurance on his own life for £500 to his five daughters, viz., the four plaintiffs, and one Annie Malone, since deceased, to be equally divided between them share and share alike, with a direction that, if any of them died, her or their share or shares should be equally divided amongst the survivors. There is also a direction that his executors should invest the sums payable to his daughters until the death or marriage of his wife, or until the marriage of his daughters, or until they should commence business on their own account, whichever event should first happen, but in no case until they personally attained the age of twenty-one years. The executors of the will were John George Donaldson, who is described as the manager of the Belfast Bank,

K. B. Div. 1911. MALONE *v.* BELFAST BANKING CO. Palles, C.B.

Cookstown, and two others; James Malone and William Browne, who do not appear to have acted either as executors or trustees, and may, therefore, be left out of consideration.

Peter Malone died on the 29th June, 1886, and on the 13th October, 1886, his will was proved by John George Donaldson alone.

The policy of insurance had been deposited by Peter Malone (who was a customer of the defendants) with them as a security for an overdraft. Accordingly, Donaldson lodged the probate of Malone's will with the defendants to enable them to obtain payment of the policy moneys, and they, having thus notice of the trusts which affected it, on the 20th October, 1886, received from the insurance company on foot of it £690 14*s.* 10*d.*, which was duly credited by them on that day to the account of Peter Malone.

At the time of his death the amount of Malone's overdraft was £161 13*s.* 10*d.*, and part of the policy moneys when received by the bank were rightly applied by them to the discharge of this sum, after payment of which £529 1*s.* 10*d.* remained in the bank to the credit of the account of Peter Malone. The payment of this sum of £161 13*s.* 10*d.* out of the specifically bequeathed policy moneys of course raised an equity in the plaintiffs and their deceased sister to have that sum recouped to the trust fund out of Peter Malone's residuary estate. The £529 1*s.* was, on the 23rd October, 1886, paid out to Donaldson, the executor. On the day on which this payment was made to Donaldson he had a private account with the bank, with an authorized overdraft limited to £200, but his actual overdraft on the morning of that day amounted to £1180 11*s.* 1*d.*, the rate of interest then being charged on his overdraft being at the rate of 5 per cent. On the same 23rd October, he lodged to the credit of his account £303 6*s.* 5*d.*, and on the 26th the further sum of £313 2*s.* 5*d.*, and, in my opinion, it was competent to the jury to conclude that the first of these sums was part of the £529 1*s.* drawn by him from Malone's account on the same day, and that the sum lodged on the 26th included the balance of that £529 1*s.* It has not been shown that any part of this £529 1*s.* was required to be applied, or was in fact applied, in payment of debts of Peter Malone or otherwise in due course of administration. I entertain a clear opinion that this £529 1*s.* was drawn out by Donaldson with

the intention on his part of applying it, as he forthwith did apply it, in breach of trust. I am quite aware of the line of cases of which *Gray* v. *Johnston* (1) and *Shields* v. *The Bank of Ireland* (2) are types, and that the fact of the bank honouring Donaldson's cheque for £529 1*s.* under these circumstances would not, *per se*, have been sufficient to fasten liability on the bank, had Donaldson been no more than one of its ordinary customers. The position of a bank in such circumstances is stated with extreme lucidity by Lord Cairns in *Gray* v. *Johnston* (3): "On the one hand, it would be a most serious matter if bankers were to be allowed on light and trifling grounds—on grounds of mere suspicion or curiosity—to refuse to honour a cheque drawn by their customer, even although the customer might happen to be an administrator or an executor. On the other hand, it would be equally of serious moment if bankers were to be allowed to shelter themselves under that title, and to say that they were at liberty to become parties or privies to a breach of trust committed with regard to trust property, and looking to their position as bankers merely to insist that they were entitled to pay away money which constituted a part of trust property, at a time when they knew it was going to be misapplied, and for the purpose of its being so misapplied. I think, fortunately, your Lordships will find that the law on that point is clearly laid down, and may be derived without any hesitation from the authorities which have been cited in the arguments at your Lordships' Bar, and I apprehend that you will agree with me when I say that the result of those authorities is clearly this: in order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor; and there must, in the second place, as was said by Sir John Leach in the well-known case of *Keane* v. *Robarts* (4), be proof that the bankers are privy to the intent to make this misapplication of the trust funds." These words of Lord Cairns show that the absence of corporate powers in the bank to act as trustees—so

(1) L. R. 3 H. L. 1.
(2) [1901] 1 I. R. 222.
(3) L. R. 3 H. L., at p. 11.
(4) 4 Madd. 357.

K. B. Div. 1911.

MALONE v. BELFAST BANKING CO.

Palles, C.B.

much relied on by Mr. Ronan—are not relevant, the liability of the bank, if any, arising not from itself being a trustee, but by reason of its being privy to a breach of trust by another, who is a trustee, or liable to be dealt with as a trustee.

The vital element which distinguishes the present case from *Gray* v. *Johnston* (1), and all the other cases cited, is that Donaldson was not merely a customer of the bank, but was also the manager of its Cookstown Branch, and if knowledge of his actual intention, as fraudulent trustee, to apply these trust moneys to his own private purposes, is to be held to be his knowledge as manager, and, is, therefore, to be imputed to the bank, then the bank, although in fact innocent, must be conclusively held to be a party to the fraud. That is not only the substance of the judgment of Lord Cairns, but is an elementary proposition in the law of trusts.

Donaldson, as trustee, draws a cheque intending to apply the proceeds to his own private purposes in breach of trust. If Donaldson is to be deemed to know this as manager, then Donaldson, as manager, honours the cheque to enable himself as trustee to commit a breach of trust. Is, then, his intention to misapply it to be deemed to be within his knowledge as manager? I believe it to be settled law that it must be so deemed. I look upon the case I am about to refer to, viz., *Collinson* v. *Lister* (2), as no more than an illustration of the application of a familiar principle of equity, and not as laying down any new doctrine; but whether I am right or wrong in thus viewing it, it is conclusive of the question. The facts in that case were that a testatrix advanced money on mortgage of a ship, which at her death was under repair. The ship-builders refused to part with the ship without payment of their lien for work. Without due consideration, and under circumstances which the Court held amounted to negligence on the part of Lister, the executor, he borrowed money to pay off the lien from the Goole Branch of York City and County Bank, of which branch he was manager, and he took a further mortgage from the mortgagor of the ship to secure the amount. This mortgage he assigned to

(1) L. R. 3 H. L. 1. (2) 20 Beav. 356, 369, 7 De G. M. & G. 634.

the bank, who sold the ship for less than the amount of the advance. The Master of the Rolls (Sir John Romilly), and on appeal the Lords Justices (Knight Bruce and Turner), held that the negligence of Lister had incapacitated him from charging the estate with the advance, and that the bank, the mortgagee, having notice, was in no better position. The notice to the bank was established by imputing to the bank, by reason of Lister's position as manager, notice of the facts within his knowledge as executor, and of his intention as to the application of the sums the bank was about to advance—the very question here. The dual position of Lister, which is identical with that of Donaldson, is thus described by the Master of the Rolls :—"He was both the borrower and the lender ...; and all facts known to him, as executor, were also known to him as agent of the bank, and must bind and conclude the banking company, exactly in the same manner as if they had acted directly in the transaction with full notice of them. The circumstance of his also being the executor does not in my opinion affect or alter the transaction, and I look at it in exactly the same light as I should do if he had advanced money to a third person who had been the executor of the testatrix, and that when he did so, he knew all the facts connected with the estate, and knew the purposes for which it was advanced." On these grounds the Master of the Rolls disallowed the claim of the bank against the estate. This decree was affirmed on appeal. The judgment of Knight Bruce, L.J., is, as usual with that learned Judge, outspoken and clear (7 De Gex. M. & G. 634). "The first question," he says, "is whether as to these three sums the company have a better right or firmer standing ground than their dismissed officer and present ally Mr. Francis Lister, the executor, possesses—a question I think to be answered certainly in the negative. There have been instances, no doubt, in which a dishonest executor, by borrowing money in that character, has been able to make the lender effectually a creditor on the estate of the deceased. But if at the time of a loan to an executor as executor, and before parting with the money, the lender has notice that the borrower in borrowing acts improperly, commits a breach of trust, and intends to misapply the money, the lender acquires no better title against the estate than the executor himself has, and must

K. B. Div. 1911.

MALONE v. BELFAST BANKING CO.

Palles, C.B.

stand or fall with him. This rests not only on the plainest principles of justice but on the direct authority of Lord Eldon, nor on his great authority alone." Of course all that is now elementary doctrine. I read it for the purpose of showing his view of the question he had there to determine. Then he comes to the question of notice to the bank, as to which he uses these words:—"And if a banking company has what is called a branch bank, managed or superintended by a local agent, who in that character advances money of the banking company by way of loan, knowing at the time facts which render the loan an improper transaction and would prevent the agent sustaining it were the transaction and the money his own, as in the instance of a trustee borrowing money in that character who, by the very act of borrowing, commits a breach of trust, having sought and obtained the money for the sole purpose of misapplying it, and circumstances being all known at the time to the agent lending, I apprehend it to be clear that the banking company acquire no better title than the agent would have done had the case been his own or the trustee's."

The notice of a fraudulent intention to apply, in breach of trust, money advanced by a bank must equally apply whether the advance is effected by a loan of the bank's own moneys or by the application by means of a cheque of trust moneys, in breach of trust. In the one case the advance should be refused; in the other the cheque should be dishonoured.

Upon the whole, then I have arrived at the clear conclusion that notice of Donaldson's frauds has been fastened on the bank from the 23rd October, 1886. I have examined the proved copy of Donaldson's account with the bank with as much care as was possible since it was put into my hands the day before yesterday. As far as I can see, there never was a balance to his credit from the period at which the copy of the account commences, shortly before the 23rd October, 1886, to the time at which his defalcations were discovered, twenty-three years afterwards.

Although it does not touch the question of the bank's liability, I cannot refrain, in consequence of Mr. Ronan's argument as to the difficulty of carrying on banking business if we hold the defendants liable, from expressing my astonishment that the

system of inspection was such that the overdrafts of the manager, often amounting to £1200—six times the authorized limit—and the extensive nature of the transactions recorded in his private account with the bank, failed to excite suspicion and demand inquiry.

The credit to part of which the bank is entitled against the £529 1*s.* 10*d.* is in respect of the £300, the consideration paid by Donaldson, for the assignment on the 20th October, 1887, of the mortgage debt due to Brown. The bank's title, however, to this credit is through Donaldson; they therefore cannot have any greater right to it than he had, and his right to the credit would be subject to his bringing back any other part of the trust funds which he received, or ought to have received, before that date, as, for instance, the £161 13*s.* which the bank deducted from the policy moneys, and for which the residuary estate was through Donaldson bound to recoup the specific legatees of the policy moneys. All the facts taken together seem to me to establish the liability of the defendants for the subject-matter of question No. 2.

I pass on now to the other items with which the plaintiffs seek to charge the bank. They consist of the £313 4*s.*, the amount of the deposit receipt, and the various sums of £12 a year paid to Donaldson on foot of the mortgage originally granted to Brown, and assigned to Donaldson. As to them, the view I have already expressed shows that the only proof I deem necessary to establish the bank's liability to them is that of their payment into the bank, or to Donaldson as manager of the bank.

Before proceeding to the consideration of particular circumstances as to each of these sums it is right to mention a matter which has been made the subject of some comment, which is equally applicable to both, as it was well calculated to produce the belief entertained by the plaintiffs that their money was in the bank. Donaldson, on the 13th of August, 1893, with the consent of the plaintiffs, lent Mrs. Malone, the mother, and her son, £134, which they required for repairing their house. This transaction took place at the bank at which this sum was entered in Mrs. Malone's pass-book by Donaldson. He required Mrs. Malone and her son

K. B. Div. 1911.

MALONE v. BELFAST BANKING CO.

Palles, C.B.

to sign two undated promissory notes, one for £100 and the other for £34, in which blanks were left for the dates, the times of maturity and the names of the payees, but they were made payable at the office of the bank at Cookstown. They were afterwards paid by the mother. One of these promissory notes—that for £100—was produced from the bank. Miss Mary Malone is witness to it. She swore at the trial in reference to those notes that Donaldson, as a reason for his requiring them, told her that "he wished to keep the bank safe and himself safe." That was an act of his as manager of the bank.

As to the sum of £313 4*s*., the jury have found that the deposit receipt was entrusted by the plaintiffs to the defendants as a banking transaction for the purpose of having its proceeds invested in the bank. This finding involves that its receipt by Donaldson was not as trustee, but as manager. Thus, the only question as to it is, Is there evidence to support the finding? The material facts as to it are these—Mrs. Malone, the mother, and the plaintiff, Ellen, had a deposit receipt of the defendants in their joint names for £300, which they desired to add to the trust account. The plaintiff, Mary, by her mother's direction, endorsed the mother's name upon it, and Ellen, by the like direction, brought it to the bank, met Donaldson there, and endorsed her own name upon it. The amount due on it for principal and interest was calculated in the bank by one of the bank clerks to amount to £313 4*s*. Ellen swore she told the official behind the bank counter that this was to be added to the money in the bank. Her words were—"My sister sent me down with this deposit to be added to our money in the bank." There appears to be some doubt as to whether the further words "making it up to £1000" were used by her to the bank official, or were a conclusion by her of the effect the lodgment had, but this is immaterial. The deposit receipt has endorsed on it "for investment." It was left with the bank officials, and the amount due upon it was on the same day credited to Donaldson's account. In my mind this evidence is amply sufficient to show that the money was put into the hands of Donaldson as manager. In fact, it never was out of the possession of the bank. The case is, by reason of the dual position

filled by Donaldson, and of other circumstances, even stronger than *Thompson* v. *Bell* (1).

As to the various annual sums of £12, they, too, have been found by the jury to have been paid to the bank to be invested in the Bank by the plaintiffs. As to these, Mary Malone swore, "I wrote my mother's cheque for the £12, which she paid every year. I gave them to Donaldson every year. When he would come I would hand him cheque." These cheques were on defendants' bank. Such of the bank lodgment dockets as have been produced by the defendants show lodgments to Donaldson's credit in the bank of such of these cheques as were given about the time of these lodgments. Many of the dockets have been lost, and are not produced. Donaldson had no other means of cashing them in Cookstown, save by drawing the amounts or by lodging them in the bank. The legal effect of either mode of dealing with them is the same, but it was Donaldson's interest to lodge them, as *pro tanto* they reduced his overdraft bearing interest. Such of those lodgments as were proved were sufficient to show Donaldson's usage of dealing with them in this, the only reasonable way. No evidence was given to show that any such cheque was not so lodged, and I hold that it was competent to the jury to find that all of them were lodged in the bank to Donaldson's credit. Being so lodged to Donaldson's credit, with the bank's knowledge, through Donaldson, that they were the plaintiffs' moneys, and that Donaldson had been misappropriating such of their moneys as he had already received, and intended to misappropriate the further sums then being lodged, the case, as regards them, is similar to that in reference to the £529 1*s.* 10*d.*, and the same result would ensue if, instead of lodging them, he obtained cash for them across the counter.

This covers all the items in question, and renders it unnecessary for me to consider some other arguments. I may say, however, that I conceive that Ellen's statement to the bank official, "that the deposit receipt was to be added to our money in the bank"—a statement made in a transaction to which Donaldson was a party as manager, and one which he must have known referred to the

(1) 10 Ex. 10.

K. B. Div. 1911.

MALONE v. BELFAST BANKING CO.

Palles, C.B.

£774, the amount he had, by his last account, admitted to be in his hands, and upon the faith of which, without contradiction, Ellen was allowed to deposit the £313—is evidence from which a jury might infer assent by the bank to its truth, and consequently, an acknowledgment by the bank that £774 of the money of the plaintiffs was then in the bank.

It has been said that it is not proved that Donaldson was present, or heard this statement made by Ellen to the bank official. I do not stop to consider whether or not this is accurate. I hold it to be immaterial. Lord Loreburn and Lord Halsbury state in *Pearson* v. *Dublin Corporation* (1), "that the principal and agent are one, and it does not signify which of them made the incriminated statement, and which of them possessed the guilty knowledge." I am of opinion that this principle applies to more agents than one, acting in the same transaction, and to a case of fraudulent concealment, where there is a duty to speak the truth, as well as to a case of fraudulent representation. The bank, the principal, who had the knowledge, through their manager, that the plaintiffs had been defrauded, were informed, through their other official, that the plaintiffs were acting on the belief that their trust funds (known to the bank through Donaldson to amount to £774) were lodged in the bank, and they did not undeceive them, but permitted the fraud to be persevered in for eight further years. Who can say what would have been the result to the plaintiffs had that statement been, on the moment, contradicted? In my opinion, this transaction alone would be sufficient to sustain a verdict against the bank for the sum due on all antecedent transactions; and as the conduct of Donaldson in the future transactions was of the same character as his previous conduct, it could not have been withdrawn from the jury, in considering whether those future acts of Donaldson were not, as were the previous ones, his as manager.

Much has been said of the yearly accounts or statements furnished by Donaldson to the plaintiffs as beneficiaries, and the question has been discussed, whether they are to be taken to be his accounts, on the one hand, as a trustee or executor, or, on the

(1) [1907] A. C. 354, 359.

other, as manager of the Bank. I have carefully examined each of these accounts. I do not say, nor do I think, that they could have been withdrawn from the jury, on the question whether the acts of Donaldson were those of a bank manager or of trustee. The three written on bank paper were well calculated to deceive people so little acquainted with business as the plaintiffs apparently were, and there is an item in No. 1 which a witness for the defendants, Mr. Ekin, their present manager of this branch, states represents a banking deposit; but my own opinion is, that Donaldson purposely framed them as trustee accounts, in order to prevent his frauds being discovered in case one of the documents should accidentally be seen by a superior officer or a director of the Bank. But, in my opinion, there is ample evidence to sustain the verdict without placing any reliance on them as acts of Donaldson as manager.

None of the cases cited sustains the defence. The judgment of Farwell, L.J., in *Lloyd* v. *Grace Smith* (1), on which Mr. Ronan's main reliance was placed, rested on the distinction taken in the judgment of the Privy Council in *Russo-Chinese Bank* v. *Li Yau Sam* (2) between an agent, held out as having only a limited authority to do on behalf of his principal acts of a particular class (which was the authority the solicitor's managing clerk was held out as having), and the authority which I am of opinion the manager of a bank is held out as having, viz., a general authority to do acts of this particular class. The old and well-known case of *Grant* v. *Norway* (3) is as good an example as can be found of a person held out to have a limited authority only. *Cave* v. *Cave* (4) and *Fitzroy* v. *Bessemer* (5) were cases of notice through agents out of transactions in which they acted for other principals. In the present case the notice arises out of the very matter itself —the intention of Donaldson at the time the bank paid him the cheque.

Bishop v. *Lady Jersey* (6) turned on its special facts. The Vice-Chancellor was of opinion that Lady Jersey well understood

(1) 27 Times L. R. 409.
(2) [1910] A. C. 174.
(3) 10 C. B. 665.
(4) 15 Ch. D. 639.
(5) 50 L. T. (N. S.) 144.
(6) 2 Drew, 143.

K. B. Div. 1911.

MALONE v. BELFAST BANKING CO.

Palles, C.B.

that the money was given to Wood to give to his own son. *Whitechurch* v. *Cavanagh* (1) and *Barnett* v. *South London Tramway Company* (2) were decided on the nature of the authority which a secretary is held out as possessing, and the decision in the *British Mutual Banking Company* v. *Charnwood Forest Railway Company* (3) was rested by Lord Bowen (page 718) on the ground that the fraudulent representation of the agent there could not have been within the scope of his authority, as under the corporate powers of his principal (the company) it had no power to make such a representation.

In *Brocklesby* v. *Temperance Building Society* (4) the question was, whether a person who placed his title-deeds under the control of his agent to procure money for him by means of them was liable to a banker who honestly made an advance to the agent on the security of them, although the advance was in excess of a limited amount to which the principal, by a secret direction, attempted to restrict him. There, the giving of possession of the title-deeds to the agent for the purpose of raising money was rightly held to be a holding out of him as having unlimited authority to borrow, which was not qualified by a secret limitation unknown to the lender.

In *Montaignac* v. *Shitta* (5), the question was, whether a particular borrowing, by a firm who were under the necessity of raising funds, was so far outside the ordinary course of business in Lagos that it ought to have been understood by a lender to be out of the course of business. That question was one of fact, the conclusion of which, in the Colonial Court, the Privy Council declined to reverse.

In *M'Kay* v. *Commercial Bank of New Brunswick* (6), the Court did no more than adopt the decision of the Exchequer Chamber in *Barwick* v. *English Joint Stock Bank* (7).

There are some matters which were not adverted to at the trial, or here, and which it is unnecessary to discuss. Amongst

(1) [1902] A. C. 117.
(2) 18 Q. B. D. 815.
(3) 18 Q. B. D. 714.
(4) [1895] A. C. 173.
(5) 15 App. Cas. 357.
(6) L. R. 5 P. C. 394.
(7) L. R. 2 Ex. 259.

them is, whether the deceased daughter, Annie, died in the lifetime of her father, as otherwise her personal representatives would have been entitled to a share of the fund, but all through the twenty-five years over which the evidence has ranged, the plaintiffs appear to have been dealt with as its owners. So, too, as each of the daughters attained twenty-one she might have been entitled to require payment of her share, although her mother was alive, but the fund was dealt with throughout as subject to a continuing trust.

There is also the rate of interest and the mode of calculating it with annual rests. I do not say that 4 per cent. might not have been sought, but that is not insisted on, and yearly rests are justifiable and warranted by reason of the trust for investment. Further, I am of opinion that the transaction which took place in 1901 in reference to the deposit receipt, in which the bank acquiesced in the statement of Ellen Malone that "the deposit receipt was to be added to our money in the bank," is sufficient to show the adoption by the bank of the mode in which—to their knowledge through their manager—the interest was calculated in the account referred to, *i.e.*, 3 per cent. with annual rests.

I have now gone through all the matters discussed at the trial, and, on the whole, my opinion is not only that the evidence is sufficient to sustain the verdict, but that the weight of it largely preponderated in its favour. I hold the verdict to be a most righteous one—one in accordance with both justice and law; and I am of opinion that the application to disturb it ought to be refused with costs.

KENNY, J.:—

The question for decision in this case is whether there was evidence sufficient to justify the jury in finding, as they did, that the plaintiffs' moneys were entrusted by them to the bank, and that Donaldson, in his transactions with the plaintiffs, was acting partly as trustee and partly as bank manager. If there was evidence fit to be submitted to the jury, the verdict must stand.

In my opinion, there is no question of law for decision in

K. B. Div. 1911. — MALONE v. BELFAST BANKING CO. — Kenny, J.

the case. The liability of bankers in relation to circumstances such as those we have here does not, I think, present any question difficult of solution. The primary business of a banker is the receipt, disbursement, and application of the moneys entrusted to him by his customers. He accepts such moneys on the condition that he will repay them to the customer, or dispose of them as the customer shall direct—subject of course to any possible lien. The account so opened may be an executor's or trustee's account, known to the banker as such,—and, in such a case, the banker undertakes no duty or liability as executor or trustee and is bound to honour the cheques of the customer or apply the moneys as he directs so long as he has no notice of a contemplated misappropriation. The defendants here, by their constitution, have no power to act as trustees or executors, but that circumstance leaves untouched their liability if their action be equivalent to a concurrence in a misapplication of the moneys. If the bank permits a dealing with a fund which to its knowledge is wrongful, it becomes a participator in the act and must make good any loss that has been incurred through its action. In this illustration of liability there are three personalities—the trustee depositor, the *cestui que trust*, and the bank. In the ordinary relations of banker and customer the former is liable for moneys lodged with him, if, by any default on his part, he has misapplied them. If he has placed them to a wrong account, or paid them out to a person or for a purpose unauthorized by the customer, the latter is unaffected by such a dealing and in law the banker still has his money. This view of a banker's liability as distinct from participation in a breach of trust is important having regard to the plaintiffs' contention that the defendants through their manager represented to them that this money was standing to their credit in the bank,—in other words, that the money was held by the bank for them. It, therefore, becomes essential to consider—(1) the position of Donaldson, the nature of the representations made by him, to whom they were made, and the time and place at which they were made; and (2) whether, under the circumstances, there is evidence to warrant a jury in finding that the bank had notice, either express or imputed, of the wrongful dealings with the plaintiffs' moneys.

Donaldson occupied two positions,—he was the manager of the defendants' local branch, and he was also trustee and executor of the will of the plaintiffs' father. He acted as executor,—he received the main portion of the assets,—he constituted himself trustee for the plaintiffs,—and for over twenty years he received the small sums that represented their income and purported to accumulate it for them. During the greater portion of this time the plaintiffs' mother was alive and kept a current account in her own name in this branch bank. At the time of Malone's death Donaldson had his private account also there. It was then overdrawn, and continued as an overdrawn account up to the time when he absconded, and during all that period he was fraudulently appropriating the plaintiffs' moneys by lodging them to the credit of his private account in reduction of his overdraft. Apparently, he was fully trusted by the plaintiffs, and it is not unnatural to suppose that such confidence was largely the result of the responsible position which he held as manager of the defendants' bank.

Now, what were the circumstances and what was the nature of the representations made to the plaintiffs by this gentleman who filled the position of trustee and manager? and what was the impression left on the plaintiffs' minds as to the custody of their money? What the plaintiffs thought or believed is of course not a determining factor in the case, but it is an element which must be considered. Year after year from the time of their father's death Donaldson furnished them with returns purporting to show the amount to which at the end of each year they were entitled. With the exception of one transaction—in the year 1893—these accounts consisted wholly of credits. They bore headings that varied from account to account such as, "Miss Catherine Malone and sisters," "P. Malone, daughters' account," "Peter Malone, deceased, daughters' Trust Account," "Executors of P. Malone, deceased,"—the last one of all, that of 5th February, 1909, the account referred to in the writ in this action, being headed "Executors, Peter Malone, deceased." The one debit transaction, to which I have referred, took place in August, 1893, when the balance in the plaintiffs' favour was reduced by a sum of £134 lent to their mother and brother. The amount

K. B. Div. 1911.

MALONE v. BELFAST BANKING CO.

Kenny, J.

was subsequently repaid and again appears in the returns as having been received by Donaldson. The plaintiff, Mary Malone, who, with her sister Ellen Malone, seems to have been the member of the family conducting affairs with Donaldson, says, "We always thought our money was in the bank. I knew the money was to be invested. I knew he was doing it as trustee and bank manager. I thought all the money was in our name. I thought as bank manager he could deal with the money." She admits on cross-examination, when her attention was called to the yearly returns and their headings, that she understood one to be the account of her father's estate,—another to be the account of her father's executors,—and another to be the account of the trustee of her father's estate. But do these admissions qualify her statement—if she is to be believed—that they thought the money was in the bank and that Donaldson was acting as trustee and bank manager? I think there is little doubt that they understood that he had such control over it as enabled him to draw on it without consulting them. But again the question arises, in what capacity? Some of the returns are written on bank dockets—one of them has the heading that "all letters are to be addressed to the manager"—several of them are on bank paper with the bank address,—and two at least of the dealings between the plaintiffs and Donaldson took place in the bank itself. One of the latter was in relation to the loan to the mother and brother of the £134. The promissory note or notes that were given for that advance,—one of which is produced from the custody of the Bank,—were repaid in 1894 and 1895, and the last payment, that of £100, was handed by the plaintiff Mary Malone to Donaldson in the bank. No doubt Donaldson was in the habit of sometimes, if not indeed generally, bringing the returns to the plaintiff's house in person. The second occasion on which a dealing took place in the bank itself was that on which the amount of the deposit receipt was lodged, and to which I shall presently refer at a little more length. The plaintiff Mary Malone further deposes that, immediately after her father's death, when discussing with Donaldson the matter of the policy money, she asked him "Was that the money we now had lying in the bank?" he said,

"Yes." She further says that, in the matter of the bills for £100 and £34, he said "he wished to keep the bank safe and himself safe." As against all this, it is said that the plaintiffs must have known he was acting solely as their trustee and not as bank manager, inasmuch as some of the transactions took place in their own house and not at the bank, and that he credited them with a fixed rate of interest of 3 per cent., which a bank would not unless by special arrangement allow, and that the form of the accounts which he rendered each year was not such as would emanate from a bank but would be applicable in the case of a trustee. These no doubt form strong arguments and were of course duly presented to the jury, but they had to find their verdict on the case as a whole; and in my opinion it could not be said that the defendants' case was so conclusive as that it could be withdrawn from the jury.

In arriving at that opinion I have not considered the weighty circumstances attending the cashing of the deposit receipt in September, 1901. The withdrawal of the amount of that receipt, the calculation of the interest on it, and the transfer of the amount either to Donaldson or to his account all took place in the bank. The deposit receipt was brought to the bank by the plaintiff Ellen Malone, and the note of her evidence as it appears on the learned Judge's report is, "Official behind bank counter. I said this was to be added to the interest to the money in the bank. My sister sent me down with this deposit to be added to our money in the bank, making it up to £1000." This latter sentence is not evidence against the bank, but I would draw the not unnatural conclusion from the remainder that she saw an official of the bank other than Donaldson and made to him the observations she deposes to. If it was made to Donaldson himself the transaction seems to be capable of bearing the complexion of having been with Donaldson *qua* bank manger,—at least it was, I conceive, open to the jury to take that view; and if that is the nature of the dealing, I can see no reason for holding that the jury were not at liberty to regard it as an ordinary banking transaction in which the bank received money to be put to the credit of the plaintiffs, and instead of doing so, had placed it to the credit of another person,—or one

K. B. Div. 1911.

MALONE v. BELFAST BANKING CO.

Kenny, J.

in which the bank, with notice that the money was the plaintiffs', accepted it as such and yet permitted the gentleman who filled the double position of trustee to the plaintiffs and manager of the bank to divert it from its true purpose and to pay with it a portion of his own debt to the bank. I cannot but think that from whichever of these two points of view this matter of the deposit receipt be regarded, there was evidence of a reasonable character on which a finding of the jury that Donaldson received the money as manager and that the bank must be deemed to have had notice of this misapplication, might properly be based. I, therefore, am of opinion that the verdict should not be disturbed and that it should stand for the full amount. I feel it impossible in considering the evidence to separate the circumstances attending the receipt and misapplication of the amount of the deposit receipt from those connected with the other moneys. Each set of transactions throws light on the other, and the jury were entitled to regard them as a whole.

C. N. K.

R. ST. J. C.

Appeal. 1912.

Feb. 1, 2, 5, 6, 7, 19.

The defendants appealed (1).

Ronan, K.C., Chambers, K.C., Bates, K.C., Wylie and *Malone*, for the appellants.

We contend that the defendants are entitled to judgment, inasmuch as there was no evidence to sustain the findings of the jury, and the defendants cannot, in point of law, be held responsible for Donaldson's acts. The decision of Palles, L.C.B., in the Divisional Court, was based mainly on *Collinson* v. *Lister* (2), but that case has no bearing on this. There, according to the argument of Sir R. Palmer, the banking company claimed only such interest as their agent could have had, and their agent had, in fact, no enforceable claim. But if the effect of that decision is

(1) In the Court of Appeal, before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

(2) 20 Beav. 356; 7 De G. M. & G. 634.

that knowledge of all facts, including his own intention to defraud, known to Donaldson in his dual capacity of manager and executor, ought to be imputed to the defendants, it goes too far, and such a decision would be entirely inconsistent with *Bishop* v. *Countess of Jersey* (1), and *Lloyd* v. *Grace, Smith, & Co.* (2), on which we strongly rely in this appeal. The decision of the Divisional Court, if allowed to stand, would extend the liability of banks to an extraordinary degree, and would render it imperative on all banks to refuse to allow any agent to keep his private account in any branch of the bank. Assuming Donaldson to have been guilty of fraud against the plaintiffs, of which there is no evidence, the general principle as laid down by Willes, J., in *Barwick* v. *English Joint Stock Bank* (3), is that "the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." That the wrongful acts of the agent, to bind the master, must be done not only in the course of the service, but also for the master's benefit, is shown by the decisions in *British Mutual Banking Company* v. *Charnwood Forest Railway* (4) and in *Ruben* v. *Great Fingall Consolidated* (5), where, at p. 445, Lord Davey expressed his agreement with every part of the legal proposition stated by Willes, J., in *Barwick's Case* (3). Here the wrongful acts alleged against Donaldson were done by him (if at all) in his capacity of executor, not in that of the defendants' manager, and those acts did not enure for the defendants' benefit. The moneys lodged to Donaldson's account were drawn out again immediately, and were lodged with the intention of drawing them again; Donaldson, in fact, was overdrawn in 1909 to the extent of £967; in any event the bank was fully secured. No question as to whether Donaldson acted for the benefit of his master was left to the jury, as in *Lloyd* v. *Grace, Smith, & Co.* (2), and such a question is not one of inference for a Judge afterwards on a new trial motion. In *Kennedy* v. *Green* (6) it was held that a principal is not affixed with knowledge of fraud practised by an agent when it is certain that as part of the same

(1) 2 Dr. 143.
(2) [1911] 2 K. B. 489.
(3) L. R. 2 Ex. 259, at 265.
(4) 18 Q. B. D. 714.
(5) [1906] A. C. 439.
(6) 3 Myl. & K. 699.

Appeal. 1912. MALONE v. BELFAST BANKING CO.

fraud the agent would conceal his wrongful acts from the principal, which is the case here: *In re European Bank*; *Ex parte Oriental Commercial Bank* (1); *Espin* v. *Pemberton* (2); *Thompson* v. *Cartwright* (3); *Waldy* v. *Gray* (4); *Cave* v. *Cave* (5); *Kettlewell* v. *Watson* (6).

That the defendants had, in fact, no actual knowledge of any wrongful act of Donaldson's is admitted: how, then, are they liable? In *Gray* v. *Johnston* (7) Lord Cairns laid down the proposition that to justify a banker in refusing to pay a cheque of his customer, drawn by such customer as executor, there must be not only an intended breach of trust by the executor, but also proof that the bankers are privy to the intended misapplication. There is no proof in this case that Donaldson intended to misapply any of the beneficiaries' money, and the defendants could not have been privy to any such intention. Assuming that the defendants knew that Donaldson was executor of Peter Malone's will, it follows that they knew that Donaldson was entitled to the custody of the money; it was no breach of trust to pay the money into his own account, even although overdrawn: *Shields* v. *Bank of Ireland* (8); *Marten* v. *Rocke* (9). In drawing out the money Donaldson might, for all the Bank knew or could have known, have been acting in the due administration of Peter Malone's assets. These were purely commercial transactions, and as to the danger of applying the equitable doctrine of constructive notice to such matters, see the judgments of Lord Esher in *English and Scottish Mercantile Investment Company* v. *Brunton* (10), and of Lindley, L.J., in *Manchester Trust* v. *Furness* (11), where the latter Judge said, to extend this doctrine would be "doing infinite mischief and paralysing the trade of the country."

The plaintiffs' own case is that the moneys sued for were entrusted to Donaldson for investment on their behalf; but to invest moneys for clients is no part of the duties of a bank; they

(1) L. R. 5 Ch. App. 358.
(2) 3 De G. & G. 547.
(3) 33 Beav. 178.
(4) L. R. 20 Eq. 238.
(5) 15 Ch. D. 639.
(6) 21 Ch. D. 685.
(7) L. R. 3 H. L. (1).
(8) [1901] 1 I. R. 222.
(9) 53 L. T. (N. S.) 946.
(10) [1892] 2 Q. B. 700, at 708.
(11) [1895] 2 Q. B. 539, at 545.

are not authorized to do so: *Bishop* v. *Countess of Jersey* (1); that is the duty of an executor or trustee, and the defendants are precluded from acting as such; therefore, they could not have authorized Donaldson to act as such, and "the capacity of the Company being limited, they cannot be legally bound by any acts of their directors or officers in which the Company themselves were incompetent to engage": Lindley on Companies, 6th ed., vol. i., at p. 213.

As to the accounts furnished by Donaldson to the plaintiffs, we contend that they are executor's accounts, and no more. They are such in form, given by Donaldson as such, and received by the plaintiffs, admittedly, as such. It was Donaldson's duty as executor to furnish these accounts; it was no part of his duty as bank manager to do so, as the plaintiffs had no account in the bank; the moneys were included in the account of Donaldson, who had the rightful charge of the moneys, and on payment to him the bank got a good discharge in respect of all the sums sued for, including the money on deposit receipt, which originally was not given to him at all, but to another official, and Donaldson received it, in his capacity as executor, for investment along with the other moneys of the plaintiffs.

As to the account for moneys had and received, we rely on the Statute of Limitations.

[*Coleman* v. *Bucks and Oxon Union Bank* (2); *Marten* v. *Rocke* (3); and *Thompson* v. *Bell* (4) were also cited and discussed.]

Henry, K.C., *S. L. Brown, K.C.*, and *Muldoon*, for the respondents:—

We do not dispute most of the authorities cited, but the question for determination is, whether there was evidence to sustain the findings of the jury, and we submit the evidence was ample. Donaldson's position must first be considered. He was placed at Cookstown by the defendants as manager of their branch

(1) 2 Dr. 143 at 163.
(2) [1897] 2 Ch. 243.
(3) 53 L. T. (N. S.) 946.
(4) 10 Ex. 10.

Appeal. 1912.

MALONE v. BELFAST BANKING CO.

bank, with no one to intervene between him as manager and the public, save the inspectors of the bank. To people in the humble position of the plaintiffs, Donaldson *was* the bank. He was there invested with authority by the defendants to get in money at as low a rate as he could, and to lend money out at as high a rate as he could. The more money he got in, the more successful he was. But for the position of authority in which Donaldson was placed by the defendants, the transactions in this case could not have occurred. At the very outset of this continuous fraud the bank had full notice that Donaldson was Malone's executor; he was so named in the probate of the latter's will, which was in possession of the bank when payment was made to them of the policy moneys; the bank had full notice that the sum of £690 14*s.* 10*d.*, received by them and placed to Malone's credit, was Malone's money, and this transaction, at its inception, was a banking transaction and nothing else. When did Donaldson cease to act as manager, and act as trustee alone? He was acting as manager when, in 1887, he spoke to Mary Malone of the balance of the proceeds of the policy as lying in the bank. He was acting as manager when, without the intervention of any other official in the bank, he drew out the balance of the policy moneys to Malone's credit, and when he drew out the £300 that was invested in the transfer of Browne's mortgage. The first account, furnished on the 17th July, 1888, was clearly one given by him as manager, and not as executor. It included on the credit side the full sum of £690 14*s.* 10*d.* received by the bank on foot of the policy, that being a sum which never came or could have come to Donaldson's hands as executor at all. The words "such bank deposit" were an intimation by him as manager that interest at the bank's fixed deposit rate was being paid on the plaintiffs' moneys in the bank's hands. So also the words, "fixed rate of £3 per cent.," suggest an ordinary deposit in the bank. Any person receiving this account would take it as a representation that they had an account in the bank producing interest as therein mentioned, and it is idle to contend that this is a mere executor's account. The account of 30th January, 1891, is of importance, it being actually made out on the bank's own paper, headed "Cookstown Branch." In the succeeding accounts the words "balance to

credit," "balance as furnished," "balance in hands," are clear representations by Donaldson as manager that the sums mentioned were standing to credit in the bank. This was one continuous transaction, commencing with the first account, and if that was an account given by Donaldson as manager, so were all.

Again, in 1893, when Mrs. Malone borrowed £134 from the plaintiffs, it was Donaldson who, as manager, entered that sum to Mrs. Malone's credit in her bank pass-book, initialling the entry with his own hand. It was as manager he required Mrs. Malone and her son to sign the two bills for £134. They were in the ordinary bank form, and passed on execution into the custody of the bank. The letter of 10th October, 1895, was written by Donaldson as manager. In it he encloses the paid bill, and the £134, when repaid, was thereafter included in the amount of the balance to credit. As to the deposit receipt this was handed across the counter of the bank, not to Donaldson but to another official; it never left the custody of the bank, and no discharge for the amount secured by it can be suggested. It is actually endorsed by Donaldson "cash for investment," that is, for investment in the bank, and the interest was calculated by Donaldson himself, and initialled by another official. This was a banking transaction and nothing else, and throughout the plaintiffs were dealing with Donaldson, as the defendant's manager, and in his capacity as such: *Thompson* v. *Bell* (1); *Russo-Chinese Bank* v. *Li Yau Sam* (2). It was the defendants who gave Donaldson, as their agent, the means of committing the fraud, and they must bear the consequences of that fraud: *Brocklesby* v. *Temperance Building Society* (3). The contention of appellants' counsel that the principal is not liable unless the fraud of the agent enures for his benefit goes too far. If that were so, a bank would not be liable for an agent's default in misappropriating moneys handed for lodgment across the counter by a customer; but see judgment of Farwell, L.J., in *Lloyd* v. *Grace, Smith, & Co.* (4). The dictum of

(1) 10 Ex. 10.
(2) [1910] A. C. 174.
(3) [1895] A. C. 173.
(4) [1911] 2 K. B. 489.

Appeal. 1912.

MALONE v. BELFAST BANKING CO.

Willes, J., in *Barwick* v. *English Joint Stock Bank* (1) was not followed in *Bank of Ireland* v. *Trustees of Evans* (2). But here the defendants are estopped from denying that Donaldson's fraud was for their benefit, as the plaintiffs' moneys all went to diminish Donaldson's overdraft, and the bank was paid out of plaintiffs' moneys. *Collinson* v. *Lister* (3) is an express authority that notice of Donaldson's acts ought to be imputed to the bank, if, indeed, this be not considered as a case where the bank—an incorporated company which can only have notice through its agents—had direct notice of those acts. The decision in *Bishop* v. *Countess of Jersey* (4) depended upon the special facts of that case.

As to the Statute of Limitations, the last account furnished by Donaldson puts an end to that defence, which in no event ought to be entertained by this Court, as it was not relied on or raised in the Court below.

Bates, K.C., replied.

Feb. 19.

THE LORD CHANCELLOR :—

The appeal in this case is on the part of the defendants against an order of the Divisional Court, affirming the judgment for £1535 2*s.* 6*d.* entered for the plaintiffs at the trial. The facts of the case are fully stated in the judgment of the two learned Judges, the Lord Chief Baron and Mr. Justice Kenny, who made the decision now the subject of the appeal, and it will accordingly be unnecessary for me to make any detailed narrative of them. As I understand the judgments, both the Lord Chief Baron and Mr. Justice Kenny agreed in thinking that there was abundant evidence to support the findings of the jury at the trial, and the Lord Chief Baron, indeed, not merely declared the evidence to be sufficient, but that it largely preponderated in favour of the jury's views. He added that in his opinion the verdict was a righteous one, and was in accordance with both law and justice. The judgment of the Lord Chief Baron took a comprehensive range, and presented

(1) L. R. 2 Ex. 259 at 265.
(2) 5 H. L. C. 389.
(3) 20 Beav. 356 ; 7 De G. M. & G. 634.
(4) 2 Dr. 143.

with grave authority the law determining the responsibility of banks for the defaults of their branch managers in the course of their service, and of their liability, arising out of the constructive notice to be attributed to them, of the facts and conditions affecting the banking business within the actual knowledge of such managers. For myself, I agree with the pronouncement made by the Chief Baron on the subject, with reference to the facts of this case, in which the misappropriations underlying the present claim were made by a branch manager of the defendants, and as I think, moreover, in connexion with banking transactions, in which the defendants' interests were involved. Mr. Ronan in his most interesting argument dealt chiefly with the legal propositions relied on by the Lord Chief Baron, and as I understood him he challenged the use made by that learned Judge of the case of *Collinson* v. *Lister* (1), which Mr. Ronan, as I remember, described as superseded. I find, however, that it is quoted as a living authority in the well-known books on the particular law, Grant and Hart, and no case was quoted in any sense disparaging it. The use the Lord Chief Baron made of it, as I understand what he said, was that in the facts of this case, as he understood them, the actual knowledge relating to the banking business present to the mind of Donaldson, the manager, even though partially derived from his position as executor of Peter Malone, should be attributed to the bank. I agree with the Lord Chief Baron that the knowledge of the real ownership of the moneys in question must be attributed to the bank. The learned counsel for the respondents, while combating the criticisms of the appellants' counsel on the questions of law, appeared to me to devote themselves chiefly to the questions raised, as to the adequacy of the evidence to support the several findings of fact by the jury. It is necessary to call attention shortly to the circumstances that led up to the payment of the first sum in dispute, being part of the proceeds of an insurance policy upon the life of Peter Malone, whose executor Donaldson was under his will. Peter Malone had been a customer of the bank, and he had an overdraft which at his death in June, 1886, amounted to £161 13*s.* 10*d.*, and to secure payment of it he had

(1) 7 De G. M. & G. 634.

Appeal. 1912.

MALONE v. BELFAST BANKING CO.

The Lord Chancellor.

assigned by way of mortgage his life policy to the Bank. On his death the probate of Peter's will was produced to the bank, and after discharging the overdraft, the balance, namely, £529 1*s.* 10*d.*, was, on October 23rd, 1886, paid over to Donaldson, his title thereto being that of executor. Donaldson no doubt had been authorized by Peter Malone's will in reference to this money, which was bequeathed in equal shares with benefit of survivorship to the plaintiffs, and another sister since deceased, to invest the amount until the death or marriage of the widow, Catherine Malone, or until the marriage of the plaintiffs, or their commencing business on their own account, whichever first happened, but in no case before their reaching twenty-one years of age. On that date Donaldson, who had been since the year 1876 the manager at Cookstown, had an overdraft on his private account of £1180 11*s.* 1*d.*, although the limit placed on the overdraft had apparently been originally fixed at £200. Having got from the bank the balance of the life insurance policy, he paid on the same date, namely, October 23rd, 1886, into the bank, at the branch of which he was the manager, the sum of £303 6*s.* 5*d.*, part of the money received by him, with the full knowledge that it formed part of Peter Malone's assets, to the credit of his private account, and thereby at once reduced his personal overdraft by the said amount. He, as manager of the bank, did this in breach of his duty, knowing that the money was not his own property, and while his own obligations to the bank were thereby reduced, in fact so much money got into the hands of the bank, and still remains there, which the bank, with the knowledge the bank had, through the manager, had, I think, no right whatever to receive or to retain. In like manner, he lodged on October 26th, 1886, £313 2*s.* 5*d.*, comprising the residue of the policy money, with a small sum added thereto, to his private account, with the same result of discharging *pro tanto* his private indebtedness to the Bank. The overdraft cases (to call them by that name) quoted by Mr. Ronan have, in my opinion, no bearing on this case, which differs from them in the vital particular that we are here in the present instance dealing with the action of a bank manager who in misapplying trust funds, no doubt in his own relief, used them for the purpose

of paying the money into the hands of his principals. I do not think that any limitation contended for, of the responsibilities of principals for the misappropriations by their agents of trust moneys, would apply to or cover such payment of personal debts due by the agents to their principals. Neither the rule relied on from *Barwick* v. *English Joint Stock Bank* (1), much less the modified statement of it made by Lord Herschell in *Thorne* v. *Heard and Marsh* (2), would in my judgment exonerate principals in such a case as that. The misapplication enured for the benefit of the bank, equally as for the benefit of Donaldson. In October, 1887, a mortgage for £300, held by a man named Brown, upon the family dwelling-house of the plaintiffs, left to the mother by their father, but subject to the mortgage, was paid off by Donaldson, and in his account with the plaintiffs was debited to the aforesaid sum of £529 1*s.* 10*d.*, received by him in respect of Peter Malone's insurance policy. Donaldson received an assignment of the mortgage, and one of the items in this case consists of the yearly sums of £12 paid to the plaintiffs by their mother, and sent by them to Donaldson. The jury have found, I think on abundant evidence, that these payments were made to the bank to be invested in the bank at a fixed rate, and no real answer can, I think, be affirmed to the claim for them. The bank appears to me to have had express notice that the moneys sent were not the private moneys of Donaldson, for it will be found that on some of the lodgment dockets, made to the personal credit of Donaldson, endorsements were made stating manifestly the particulars of the amount lodged, and it will be seen that the sum of £12 is written after the name of "Miss Malone," the "Malones," and in a couple of instances after that of "P. Malone." I have seen copies of two such dockets, dated February 12th, 1904, and February 10th, 1906, in which the sum of £12 is apparently attributed in the first-named docket to "P. Malone, d." (meaning no doubt "deceased"), and in the second to "P. Malone." That was express notice to the bank in written documents, still retained by them, that these sums were not the property of Donaldson. Malone was dead since 1886, and it must have been quite plain that at

(1) L. R. 2 Ex. 259. (2) [1895] A. C. 495 at p. 502.

Appeal. 1912.

MALONE v. BELFAST BANKING CO.

The Lord Chancellor.

the best the moneys were to be treated as part of his assets—yet the bank allowed Donaldson to credit them to his private account; and by his so doing, the bank received the moneys in payment, so far as they went, of Donaldson's debt to them. Meanwhile, though in fact so misapplied, these sums appear in the annual accounts given by Donaldson to the plaintiffs for a great number of years, to which later I shall have again to refer. The references in the endorsement of some of these lodgment dockets in connexion with the sum of £12, to Miss Malone, and to the Malones should at least have put the bank upon inquiry. At any rate, it was clear evidence in support of the jury's findings that the bank had notice that these moneys were plaintiffs' property. I see no reason whatever to disturb the jury's finding in respect of them, to the effect that they were paid to the bank to be invested in the bank at a fixed rate; and it is my opinion that there is no answer to the plaintiffs' claim upon them. It is worth considering for a moment the transaction of August, 1893, carried out by Donaldson himself, by which, at the request of the plaintiffs, £134 of the moneys was transferred to the credit of Mrs. Malone. Donaldson effected the matter by entering a credit for that amount in the bank pass-book of Mrs. Malone, who was a customer of the bank; but it is now plain that he was guilty of the duplicity of pretending to the plaintiffs that the moneys to which they were entitled were at any rate standing in the bank. He insisted on this occasion on having two bills signed by sureties for the repayment of the £134, for he said he wished to keep the bank safe and himself safe. The bills were accordingly signed, and given to the bank. But who was it made that requisition? Could the plaintiffs be deemed even indiscreet in believing that they were in relation with the bank, and that it was with the bank manager they were dealing? Did not the whole incident savour of the ordinary banking transaction?

And then the last capital item relates to the lodgment of the deposit receipt for £300 in September, 1901. Mrs. Malone gave the receipt to her daughter, Ellen, and with her mother's name signed by her sister, Mary. Ellen was sent into Cookstown by her sister with the deposit receipt, to be added to the money in the bank, making it up to £1000. Ellen went to the bank, and handed the

deposit receipt to an official behind the bank counter, and her phrase to the official, as reported in her evidence, was that "this was to be added to the interest to the money in the bank." That was a plain reference to the money consisting of the proceeds of the father's life insurance policy, and the yearly sums of £12 paid, and the interest thereon, which the Malones were informed by Donaldson was lying for them in the bank. The official took the deposit receipt, and it was, according to the bank's Inspector's evidence, plainly examined by two bank officials, and initialled by them, one of them being Mr. Carlisle, the cashier. Donaldson was not even present on the occasion of the lodgment of this sum of £300, yet what do we find? It was an ordinary piece of banking business, transacted with other officials altogether, yet the deposit receipt got into the possession of Donaldson, and he, without having seen the Malones in respect of the matter, endorsed the receipt in his own handwriting with the words "cash for investment." That endorsement, made apparently at the time on a document which must be taken to have been in the bank's possession, and has been produced by the bank, was an express declaration that the money was not to be applied for Donaldson's purposes, and was actual notice of that fact to the defendants. Yet, with great audacity, Donaldson paid the full amount to the credit of his own private account, and by doing so paid off so much of his overdraft with the defendants, and placed the money in the possession of the bank, where it still remains. In the circumstances, I think the bank had no right to receive the money; and in what view of the justice of the case can the bank hold that sum against the plaintiffs, and in the face of the finding of the jury, which was even commended by the learned Judges in the Divisional Court? I fully agree that there was abundant evidence to maintain the finding that that lodgment was a pure banking transaction, and that there was nothing in the world to justify the illegal act of the defendants' manager. The jury having found that the deposit receipt was deposited with the bank to have its proceeds invested in the bank, I fail to understand on what grounds the defendants resist payment. The only investment of the money was that Donaldson, without any authority, took and applied it to the payment of his own private debt to the defendants. The money

Appeal. 1912. MALONE v. BELFAST BANKING CO. The Lord Chancellor.

was in no way spent by Donaldson, and lies to-day in the coffers of the bank.

I referred to the yearly accounts delivered by Donaldson to the plaintiffs. There were, I understand, some years in which no account was tendered, but a considerable number are forthcoming, beginning with one dated 17th July, 1888, and ending with one dated February 5th, 1909. They have been closely scrutinized during the arguments in this Court. Some of them are written actually on bank paper, and one or two with the usual printed bank headings. The first of them may, perhaps, be well described as both a trustee and a banking account; but, as regards them all taken together, having regard to the matters stated in them, their form and language, it would be impossible for this or, I think, any Court, to reject the finding of the jury regarding them; for I have no doubt they formed the main basis of the finding on question No. 4, to the effect that Donaldson, as manager of the defendants' bank at Cookstown, represented to the plaintiffs that their moneys had been invested in the bank at a fixed rate of 3 per cent. Donaldson, according to the jury's view, delivered these accounts as manager of the defendants' bank, and made the misrepresentations contained in them. He had no title, as executor, to the £300 lodged in September, 1901, and it will be found that in the accounts following this date he includes that sum in stating the amount "to credit." The second account, dated January 23rd, 1890, was headed, "Belfast Banking Company, Limited, Cookstown Branch," and the next line is, "Miss Catherine Malone and sisters." The figures are given, and eventually the statement appears in it, "Amount to credit as at January 1st, 1890, £455." It was signed by J. G. Donaldson, as executor and trustee of Peter Malone, deceased. Notwithstanding that, the account at once suggests that the amount to credit was to the credit of the persons named on the third line, namely, Miss Catherine Malone and sisters. The next account, dated January 30th, 1891, is entitled "Peter Malone's daughters' account," and the credit to December 31st 1890, is stated to be £480 13*s*. It is signed simply "J. G. Donaldson." On the 1st June, 1894, there is a similar account entitled "Representatives of Peter Malone, deceased (daughters)," and signed merely "J. G. Donaldson." There were other various headings suggesting no

doubt that they were trustees' or executors' accounts, but, looking at them in substance, they undoubtedly appear to represent to the plaintiffs that the various sums indicated were lying in bank to the credit of the account in which the plaintiffs were at least the beneficiaries. It is impossible to say that the jury were wrong in holding, in the circumstances, that the accounts were rendered by Donaldson in his capacity as bank manager. Indeed, it was as such that his statement carried weight and conviction to the plaintiffs; for, being the manager, the plaintiffs would naturally assume that he knew beyond question the actual state of the accounts. In the very first account of July, 1888, Donaldson spoke of the fixed rate at 3 per cent., which was continued throughout. On the jury's findings, supported by adequate evidence, the liability of the bank is, I think, certain upon the accounts stated and settled. Here we have the plaintiffs' moneys actually paid into the bank, under the condition to be invested in the bank, and received by the manager of the bank. The original money, that is, the proceeds of the life policy, was allowed to remain in the bank on that basis. It is not disputed that since the death of Mrs. Malone in January, 1907, the plaintiffs were absolutely entitled to the possession of that part of the fund and, as well, the accumulations of the yearly sums of £12 paid into the bank, with the interest thereon as arranged. The sum of £300 deposited in 1901 was in no way subject to the trusts of the father's will, and was, at any rate after the mother's death, recoverable by the daughters. But the whole moneys to which the plaintiffs were entitled were left, as the plaintiffs reasonably and naturally believed, in the bank, down to February 5th, 1909, under the assurance given to them by the bank manager that they were lying safely there. By the last account, the amount so credited at the bank, according to Donaldson, amounted to the sum of £1476 5*s.* to January 1st, 1909, and, with interest since, makes the sum for which judgment has been entered. In the face of that account it is no wonder that although there was a plea of the Statute of Limitations, the defendants never raised the question of the statute, either at the trial or at the argument in the Divisional Court. Mr. Ronan, in his argument, never mentioned it; and it was only in a perfunctory manner, when it was put to him, that

Appeal. 1912. MALONE v. BELFAST BANKING CO. The Lord Chancellor.

Mr. Bates said that he relied on the statute. He did not argue the matter in any degree, and, for myself, I should have been prepared, if the point was made, to act on the principle of the view expressed by Lord Herschell at pp. 182–3 of the report of *Brocklesby* v. *Temperance Building Society* (1), and to hold that we should not at this stage entertain a defence deliberately withheld at all previous stages of the case.

The liability of the bank, is, I think, certain on the findings of the jury, well justified as I think they are. The account of February 9th, 1909, was a distinct representation by the bank manager to the plaintiffs that the moneys mentioned, and to which he knew the plaintiffs were beneficially entitled as owners, were lying in the bank. As bank manager Donaldson had full authority to give information as to the state of the accounts to the plaintiffs, who were, to his knowledge, the sole beneficiaries in the funds paid into the bank, and alleged by him and believed by them to be lying safely therein; and for his dishonest misrepresentation in that respect I do not think there can be any doubt that the bank is answerable and is bound by it. All these moneys have been misapplied by the defendants' manager, Donaldson; but if they have, every penny of them has gone into the treasury of the bank, and still remains there. It was not in gambling or in any outside speculation these moneys were misspent by Donaldson. They were all paid to his private account, and were all applied, as paid, to the partial reduction of his overdraft with the defendants. The bank has the money still. The jury have found that the bank had notice that the moneys were the plaintiffs', and I hold in any event that the actual knowledge of the manager in that respect must be attributed to them. The money can in no way be treated as involved with or covered by the further drafts voluntarily given by the bank to Donaldson. The transaction of applying the money to the payment to the bank was completed on each occasion, and it must be taken that the money is now resting at the disposal of the bank. In my judgment, then, the judgment entered for the plaintiffs was right, and the appeal ought to be dismissed with costs.

(1) [1895] A. C. 173.

HOLMES, L.J.:—

Although during the argument of this appeal many authorities were referred to, some of which were commented on at great length, I think that in consequence of the peculiar circumstances of this case, none of them gives much assistance; and our decision depends upon the application of one or two elementary principles of law to certain inferences of fact.

The action has been brought to recover the sum of £1476 5*s.*, with interest thereon, for money found to be due from the defendants to the plaintiffs, on accounts stated between them. There is also an averment that the said amount was due for money had and received by the defendants for the plaintiffs' use. The defence consisted principally of traverses of obligations in the statement of claim, as well as a defence of the Statute of Limitations which we were not aware of, in this Court, until the appeal was two days at hearing, and which in the Divisional Court was never mentioned. John George Donaldson was manager for thirty years of the defendants' branch bank in Cookstown, and during portion of that period Peter Malone, the plaintiffs' father, who carried on business in that town, had a current account therein. He died in 1886, having executed his will in 1881, which was duly proved by Donaldson, one of three executors named therein. The will was carefully prepared, and contains many provisions, the material one of which for this case is a gift to the four plaintiffs and another sister, Annie, now dead, of a policy of insurance on the testator's life with all bonuses thereon. The proceeds of the policy were to be invested by the executors, and not paid until one of certain specified events would happen, the first of which to occur was the death of the testator's widow in January, 1907. This lady, who was given substantial benefits under the will, carried on pursuant to its directions the old business, assisted by her daughters, who lived with her; and up to the time of her death she had a current account in the defendants' Cookstown bank. The testator had assigned the policy of assurance to the defendant company, to secure an overdraft, which when he died amounted to £161. The policy with the bonuses realized about £690, which was paid to the

Appeal. 1912. MALONE v. BELFAST BANKING CO. Holmes, L.J.

defendants as assignees, and placed by them to the credit of Malone's account. The balance, after meeting the overdraft, amounting to about £530, was paid on his cheque to Donaldson as executor on the 23rd October, 1886. The peculiarity of this action is the different positions held by Donaldson. In the first place, he represented the defendants in their Cookstown branch, and was held out by them to the public as their agent in all ordinary banking transactions. There is no doubt that in receiving money to be placed to the credit of a current account or on deposit receipt, in honouring drafts on such moneys, and in stating to customers or persons dealing with the bank their financial position in regard to it, he was the agent of the defendant company, which was responsible for his acts. I am not concerned as to whether this responsibility arises from estoppel, or is ascribed to any other principle. It is enough to say that it exists. The second point relating to the position of Donaldson is that he was executor of Malone's will, and trustee of the bequest to the plaintiffs. The defendants are themselves by their memorandum of association precluded from acting as trustees; but this did not apply to Donaldson, and they, by the delivery to them of the probate of the will, without which they could not have obtained payment of the policy of insurance, had notice of his position as executor and trustee.

The third point is a matter of no less importance. He had a current account with the bank, in dealing with which he was both manager and customer. He was permitted to overdraw to the extent of £200; and it must be assumed, having regard to the regular visits of the inspectors, that the defendants were aware that his overdraft was generally far in excess of the sum allowed. Bearing in mind Donaldson's triplicate position, I now come to the documents upon which, in my opinion, the case depends. The first of these was signed by him on the 19th July, 1888, two years after Malone's death. Great reliance is placed thereon by the plaintiffs; but, except on one point, I think it does not help them. In preparing and furnishing it, I am disposed to think that he thought he was acting as executor, and it seems to me to bear that character rather than that of an account of a bank manager.

In it he charges himself with about £690, the proceeds of the life policy, although only about £530 of it reached his hands. To this he adds some items of interest, to which I shall presently refer. As against this, he discharges himself by £100 applied to pay Malone's overdraft. In fact, about £160 had been so applied, but I presume Donaldson had in his hands £60 of the residuary estate, which would be applicable to reduce the debt to the bank, and, therefore, he only takes credit for £100. He next takes credit for £300, which can be easily explained. Malone had borrowed on a mortgage of the premises, in which he carried on his business, and which he had devised to his wife, £300. The mortgage at his death was vested in a man called Brown, and it seemed to Donaldson and to the family that £300 of the daughters' legacy might be well invested by Donaldson as trustee in taking an assignment of this mortgage, which bore interest at £4 per cent. per annum. This was done on the 1st November, 1887, and thenceforth the £300 secured by the mortgage formed part of the daughters' trust fund, the interest thereon being regularly paid by Mrs. Malone, the owner, under her husband's will, of the mortgaged premises, to Donaldson. I have already mentioned that, in addition to the £690 with which Donaldson charges himself in this account, he also charges himself with three items of interest entitled "Interest Bank deposit"—(1) Bank deposit to 1st January, 1887, £1 10*s.* 8*d.*; (2) do.; to 1st November, 1887, £3 4*s.* 1*d.*; (3) fixed rate "of"—I think this means "on"—£290, 3 per cent., to 1st January, 1888, £8 14*s.*, making in the aggregate £13 8*s.* 9*d.* The result of this account is to show a balance due to the daughters on the 1st January, 1888, of £303 12*s.* 1*d.* This is followed by a memorandum bringing down the account to August, 1888, showing that the previous balance of £303 12*s.* 1*d.* has increased to £413 12*s.* 1*d.*, which with the mortgage debt of £300 brought the daughters' trust fund up to £713 12*s.* 1*d.* Now, it seems to me that this account, taken as a whole, is an account of Donaldson as trustee rather than as manager of the bank, and, except in one particular, I should not hold the defendants bound by it. That particular is the statement that the sum of £290 is to bear a fixed rate of interest at £3 per cent. The meaning of a "fixed rate" of interest is well understood in this country. Banks

Appeal. 1912. MALONE v. BELFAST BANKING CO. Holmes, L.J.

pay interest on money lodged on what is called a "deposit receipt" as distinguished from an account current at a certain rate of interest varying from time to time, but where it is understood that the money will be allowed to remain in the bank for a considerable period, a higher rate of interest than that usually given will often be agreed to. That is what is meant by a "fixed rate." I think that a manager of a country branch would not agree to this without the authority of the directors; but this is a matter between himself and the directors. He is the agent to communicate to the person interested the rate of interest to be paid; and I have no doubt that the bank would be bound by the representation made by him, as in making it he would be performing his ordinary duty as manager. I should also add that Mary Malone swore that when Donaldson gave her this account she asked him was the balance in the bank, and received an affirmative answer. There is no reason to doubt this, as it only confirms what appears in the account itself. Before passing to the next document, I should like to point out what we know of the plaintiffs' trust funds, apart from the entries in the account with which I have been dealing. There is no doubt that the books of the bank would be searched in vain for an entry that could be identified as relating in any way to the plaintiffs' money. The sum amounting to about £530, which was paid by them out of the bank to Donaldson on his cheque as executor on the 23rd of October, 1886, was placed by him to the credit of his own account—part of it on that day, and the remainder three days later. At least (as Palles, C.B., points out) there was evidence from which the jury were entitled to draw this conclusion; and, indeed, the argument in this Court has proceeded on this basis. But at this time Donaldson's account was overdrawn to the extent of £1100, and not merely he but the defendants were benefited by his action by having his debt to them substantially reduced. It does not appear from what source or in what way he paid in the year following the £300 for the assignment of Brown's mortgage, but I presume it was by a cheque on his own account, which he duly honoured as manager, irrespective of how such account then stood. I do not understand the item of £100, with interest, which brought up the balance of £303 12*s.* 1*d.* due on the 1st January, 1888, to

£413 12*s.* 1*d.*; but this is unimportant, as, for the reasons I have already given, I should not bind the defendants by these figures if there was nothing else in the case.

I now come to a series of documents which enables me to affirm without hesitation the judgment appealed from. The first of them is written on a docket such as is used in banks for the purpose of giving information relating to their business.

It was headed :—

"BELFAST BANKING COMPANY, LIMITED, COOKSTOWN BRANCH,
23rd January, 1890.

"Miss Catherine Malone and sisters.

"Balance, 1st January, 1889, ...	£424
"Interest on mortgage loan for 18 months to 1st November, 1889, ...	18
"Interest on £424, for 12 months to 1st January, 1890, ...	13
"Amount to credit as at 1st January, 1890, . .	£455

"J. G. DONALDSON,
"*Executor and Trustee of Peter Malone, deceased.*"

Now, if that does not purport to be a statement on behalf of the bank of moneys held by the bank, in which Catherine Malone and her sisters were interested, I cannot understand it. Donaldson adds to his signature the words "executor and trustee of Peter Malone," but it has no resemblance to an account between a trustee and the persons interested in the trust funds. In such an account the trustee would debit himself with the trust moneys received by him, and credit himself with the price of the securities in which he had invested them. For example, in the present case, if this had been an account of Donaldson as trustee, it would have shown that he had received £300, which he had applied for the purchase of Brown's mortgage. But the £300 and the mortgage do not appear in the account, for the simple reason that the bank had nothing to do with them. No doubt he furnished the account

Appeal. 1912. MALONE *v.* BELFAST BANKING CO. Holmes, L.J.

to the plaintiffs, *because* he was their trustee; but he did so in his capacity as manager of the bank. There is one item which shows clearly that the account represents that the £424 is in the possession of the bank. Interest on that sum for twelve months is given as £13. But where did that interest come from? A trustee's account ought to show this; but where the bank manager had told the Misses Malone, as Donaldson had done n his previous account, that the bank was paying interest at a fixed rate on the trust funds in its hands, there could be no doubt that this interest came from the same source. I do not say that the account purports to convey that the money therein mentioned was standing in the names of the Misses Malone in the bank books. On the contrary, by describing Donaldson as trustee, it shows that it was under his control; but the document states in effect that the plaintiffs' trust money was deposited in the bank, to the credit of a separate account, and available for the purposes of the trust—while, as a matter of fact, there was no such deposit, and no such money. I should add that the £18 interest on the mortgage had been paid by Mrs. Malone's cheque in favour of Donaldson, who lodged it to the credit of his overdrawn account; and that the mortgage interest continued to be dealt with in the same way until Mrs. Malone's death. Similar accounts were furnished to the plaintiffs in the January of 1891 and 1892. The total amount was increased each year by the addition to the previous balance of the interest for the year; but, except in this respect, the accounts are identical in their items with that of January, 1890. They are not, however, headed with the name of the defendant company, Cookstown Branch, and no description of his character follows Donaldson's signature. There was probably a similar account in January, 1893; but in January, 1894, another was furnished containing an additional item of £134, worthy of notice. In August, 1893, Mrs. Malone required some money to put her house in repair, and she asked her daughters to lend her £134 out of their money, which they agreed to do. Accordingly, Mary Malone went to the bank with her mother's pass-book, and told Donaldson what they wished to have done, whereupon he entered £134 to credit in that pass-book. This transaction was certainly on the basis that the plaintiffs'

money was then in the bank, and could be transferred therefore to the mother's account. The important point, however, was that Donaldson said that it would be necessary for Mrs. Malone and her son to sign two undated promissory notes, one for £100, and the other for £34, and according to Mary Malone's evidence, that Donaldson told her as his reason for requiring the notes, that "he wished to keep the bank safe and himself safe." The notes were duly signed, and the amounts afterwards repaid by the mother. Why the bank required to be kept safe, unless the plaintiffs' money was lodged therein, and the £134 were to be paid to Mrs. Malone thereout, it is impossible to understand. This was strong evidence to lead the jury to believe that, as bank manager, he represented the plaintiffs' money to be then in the bank, and that the bank needed to be kept safe, if portion of it was transferred to a third party.

The account of 1894, headed Cookstown branch, shows this sum of £134 deducted from the balance as it stood in January, 1893. Six accounts follow, ending with that for the year 1899. Except that the printed heading of the bank does not appear, no distinction can be drawn between them and those I have already dealt with. If my comments on the account of January, 1890, be correct, they equally apply to each of these; and it would be waste of time to repeat them. They are not such accounts as would be furnished by a trustee to persons interested in the trust funds. They are such accounts as would be furnished by a manager of a bank to a person interested in money lodged therein, and they afford ample evidence that Donaldson acted as such manager in furnishing them.

I now come to an important transaction that occurred in September or October, 1901. Mrs. Malone had lodged in the bank, in 1898, £300 on a deposit receipt, either in her own name or in the names of herself and her daughter Mary. In the autumn of 1901 she resolved to make a present to her daughters of the sum thus secured, and having asked her daughter Mary to endorse it with her (the mother's) name, and perhaps with the name of Mary herself, she sent her daughter Ellen to the bank for the purpose of having the amount thereof lodged for the benefit of herself and her sisters. Ellen saw an official (not

Appeal. 1912. MALONE v. BELFAST BANKING CO. Holmes, L.J.

Donaldson) behind the counter, and told him that her sister had sent her down with this deposit to be added to their money in the bank, making it up to £1000. At the request of the official she signed her own name on it, and left it with him. On the same day the amount due thereon was put to the credit of Donaldson's overdrawn account, while an endorsement in his handwriting appears on the receipt in the words "for investment." Donaldson must be assumed to have known what was told to the official who received and handed to him the document; and with this knowledge he applies it to paying his own debt. How does this differ from the case of a person coming into a bank and handing the manager a sum of money to be placed to his credit, and the manager instead of doing so applies it for his own use? It is not denied that the bank would be liable in such circumstances on the ground that the manager, in receiving the money for the purpose expressed, was doing what it was his duty to do, and, therefore, was acting as agent for the bank. It is immaterial whether the liability is to be attributed to the doctrine of estoppel or of agency. In either case it exists. In the account for the year 1900, after bringing out a balance of £774 in the same way as in the previous account, there is added under date 7th September, 1901, "deposit receipt and interest £313 4*s*.," making £1087 4*s*. The two sums are dealt with in precisely the same way, and the next account begins with "balance credit £1125 7*s*.," the excess being apparently interest at the fixed rate for the year 1901. There follow six other accounts of precisely the same character as those previously given, the last being for the year 1909, in which, by reason of the interest and the yearly rests, the amount due had increased to £1476 5*s*., being the sum sued for on the account stated.

I shall not read again the findings of the jury; but I have no doubt that there was ample evidence to support their answers to questions 1, 2, 3, and 9. The result of these answers is, that in the statement of the accounts, at least from that of 1890 onward, he acted as manager as well as trustee, and that as it was part of his duty as manager to give information to persons interested in money that had come into his hands in that capacity, the defendants are bound by those statements upon the principle that in

giving them he was acting within the scope of his authority. On this ground I hold that the appeal ought to be disallowed.

It will be observed that I have not referred to many topics discussed by the appellants' counsel. I think it unnecessary to do so, having regard to the grounds of my conclusion; but there were two or three matters relied on which I wish to mention to show that they have not been overlooked.

Mr. Ronan, in opening the appeal, told us that the cause of action for an account stated had disappeared from the case, and that it was now to be regarded as an action for money had and received by the defendants for the plaintiffs' use. I was surprised at this, as the argument proceeded, and I am now satisfied that Mr. Ronan was under a misapprehension. It is true that Palles, C.B., began his judgment by saying that he treated the action as one for money had and received. But I gather, both from his judgment and that of Kenny, J., that the first count in the statement of claim was strongly relied on in the Divisional Court, as it was here.

Mr. Ronan also referred to certain answers of Mary Malone as an admission that she did not regard the accounts as having been furnished by Donaldson in his capacity of manager. I have carefully read her evidence as given in the Judge's notes, and in the shorthand writer's report, and I can find therein nothing to amount to such an admission. Reliance was also placed on the evidence of witnesses who proved that Mary Malone after Donaldson's dismissal had expressed her regret that contrary to the expressed wish of her sisters she had allowed the money to remain with Mr. Donaldson; that she had said to them, Would you distrust Mr. Donaldson? This is used to show that she was aware that Donaldson had control over the money. If she had read her father's will, she was aware that he had such control down to her mother's death; but at and after that date the beneficiaries could have taken it out of his hands, and it was natural for her to regret that she had not done so.

In conclusion, I would say that it is not to be understood that I differ in any way from the view of Palles, C.B., founded on the

Appeal. 1912.

MALONE v. BELFAST BANKING CO.

Holmes, L.J.

answer of the jury to question 11, and the decision in *Collinson* v *Lister* (1). On the contrary, I agree with it so far as I have considered it; but having taken up the question of agency first, I have based my judgment thereon.

CHERRY, L.J.:—

It appears to me that a good deal of difficulty has been caused in this case by the introduction of questions not raised by the pleadings; and by treating the plaintiffs' claim as based upon legal principles not put forward or relied upon by their counsel in any way. The claim, endorsed upon the writ, is set out in the simplest possible manner as founded upon an account stated and settled on the 5th day of February, 1909, between the plaintiffs on the one side, and the bank, acting through their agent and manager, the late John George Donaldson, on the other. The defence is—(1) a traverse of the averments in the statement of claim; (2) a plea that Donaldson was not acting as agent for the bank when he made the admission relied upon; (3) a plea that he had no authority to make such admission; and (4) (as applicable to alternative count for money had and received to the use of the plaintiffs) the Statute of Limitations. The interesting topics discussed at so much length before us as to the authority of the defendant company to act as trustee; whether the company had or had not notice of Donaldson's breach of trust; and how far a principal is liable for a fraudulent misrepresentation made by his agent for his own purposes, can only arise—if they arise at all—incidentally to the main questions in the action, which are—(1) Whether the bank received and held moneys of the plaintiffs? (2) whether Donaldson from time to time furnished accounts of these moneys to the plaintiffs *in his capacity of bank manager*? and (3) whether the defendants are bound by these accounts as furnished? The plaintiffs, by their counsel, base their claim entirely upon the accounts; and naturally so, for otherwise they would have no answer to the plea of the Statute of Limitations. If the accounts are good as acknowledgments in writing to take the case out of the Statute of Limitations, they are equally good

(1) 7 De G. M. & G. 634.

as a cause of action in themselves; while, if they are not binding upon the defendants as accounts stated and settled, they cannot be relied upon as acknowledgments in writing by or on behalf of the defendants, so as to bar the running of the Statute of Limitations. In whatever way, therefore, we regard the plaintiffs' claim, it must succeed or fail, according as we hold that the accounts furnished are, or are not, binding upon the defendant company.

Now, in the first place, as to the receipt by the defendants of moneys belonging to the plaintiffs, it appears that on the death of Peter Malone, on the 29th June, 1886, the sum of £690 14*s.* 10*d.*, which represented the proceeds of a policy of insurance on his life, assigned to the bank by deed, dated the 2nd August, 1867, as security for an overdraft, was paid to the bank and credited to his account. It extinguished the overdraft and left a balance to credit of £527 4*s.* The policy of insurance had been specifically bequeathed to the plaintiffs, subject of course to the debt due to the bank, so that this sum of £527 4*s.* belonged to the plaintiffs, and the bank had notice of their title to it, as Donaldson the manager was the sole executor of Peter Malone; and there is no suggestion that it was required for the payment of debts or administration expenses. It appears that on the 23rd October, 1886, a cheque for this balance £527 4*s.* was drawn, and the account closed. This cheque has not been produced, and the sole evidence of it is the bare entry in the account of Peter Malone. It is assumed that it was drawn by Donaldson as executor of Peter Malone in his own favour. It is also assumed, though not actually found by the jury, that two lodgments, one of £303 6*s.* 5*d.*, made on the very day the cheque was drawn, and another of £313 2*s.* 5*d.* two days later by Donaldson to the credit of his own current account, included this balance, which represented the entire trust funds belonging to the plaintiffs. Donaldson's current account was at the time overdrawn to the amount of £1180, so that if the facts were as they have been assumed to be, the whole of the trust funds were applied by Donaldson in discharge of his own personal debt to the bank.

It is contended, however, by the defendants, on the authority of *Shields* v. *Bank of Ireland* (1) and other cases, that the mere fact

(1) [1901] 1 I. R. 222.

Appeal. 1912. MALONE v. BELFAST BANKING CO. Cherry, L.J.

of a trustee lodging trust funds to his own private account is not *per se* a breach of trust, even though the account be at the time overdrawn to a greater amount than that of the lodgment. It is further contended that, inasmuch as there has been no finding by the jury in the present case, either that a breach of trust was actually committed by Donaldson, or that the bank had notice of it, if committed, the defendants are entitled to rely upon the payment to Donaldson as a complete discharge of their liability in respect of the balance of the moneys received by them from the insurance company.

I fully recognize the strength of this argument, but I do not think that it is now open to the defendants owing to the subsequent conduct of Donaldson, by which, in my opinion, they are bound. The fact of the payment to Donaldson was never communicated to the plaintiffs. On the contrary, they were led by him to believe that the money had been placed to their credit in the bank. This appears from the uncontradicted evidence of Miss Mary Malone. She deposes to a conversation with Donaldson, the date of which is not precisely fixed, but which appears to have taken place before the first account was furnished, and when he investment of the sum of £300 upon the mortgage was being considered. In the course of this conversation the balance of the policy money was mentioned. "I asked him," she says, "was that the money we now had lying in the bank. He said 'Yes'." The jury have found that in all these transactions, Donaldson was acting partly as trustee, and partly as bank manager; and he must here be taken therefore to have given this answer, as bank manager, as well as in his capacity of trustee. This conversation was followed up by the delivery to the plaintiffs of the account dated the 17th July, 1888, an important document, which, in my opinion, absolutely estops the defendants from now contending that they were discharged from liability to the plaintiffs by the payment to Donaldson. The defendants' counsel contended very vigorously before us that this account was furnished by Donaldson merely as trustee. This contention cannot be sustained as regards the first account contained in the document (for there are really two accounts on the one piece of paper). The upper one is a cash account—and a cash account only. The first item on the credit side

is the sum of £690 14*s.* 10*d.*, representing the total amount of the life policy and profits. Now, this sum was received by the bank as assignee of the policy of insurance, but Donaldson as trustee only received the balance after payment of the overdraft to the bank, viz., £527 4*s.* Any account by him as trustee should start therefore with this latter sum. An account by the bank would naturally and properly begin with the total sum paid by the insurance company to the bank. The bank, then, on the debtor side of the account, take credit for the portion of the overdraft paid out of the proceeds of the policy, the payment of £300 for the mortgage, and some small sums, leaving a balance of £303 12*s.* 1*d.* due to the plaintiffs. To my mind, therefore, it is perfectly plain that this account is an account given by Donaldson, as manager of the bank, to the plaintiffs as customers; an account of their moneys received by the bank, and of interest allowed by the bank to them at the "fixed rate" which Donaldson had told the plaintiffs that the bank would allow; and showing at its conclusion a balance of £303 12*s.* 1*d.* in their favour.

This conclusion is fortified and confirmed by the second account on the same piece of paper, which is as plainly an account by Donaldson as trustee, as the former is one by him as bank manager. This second account, carefully separated from the first by a line, is a full account of the trust funds belonging to the plaintiffs. It begins with the cash balance of the previous account, representing the money in the bank, viz., £303 12*s.* 1*d.* To that is added the sum due out of the general assets of Peter Malone, deceased, to defray the portion of the overdraft retained by the bank out of the specific legacy of the policy of insurance with interest, and a half-year's interest on the mortgage, £6, making a total of £413 12*s.* 1*d.* To that sum is added at the foot of the account the principal sum due on the mortgage, viz., £300, bringing out the total trust funds of the plaintiffs at that date as amounting to £713 12*s.* 1*d.* Here we have, thus, clearly and plainly on the one piece of paper, the two accounts, carefully distinguished, and separated by a line, the upper one being the cash account with the bank, showing a balance due by the bank to the plaintiffs of £303 12*s.* 1*d.*; the lower one being a complete account of the trust funds of the plaintiffs for which Donaldson,

Appeal. 1912. MALONE *v.* BELFAST BANKING CO. Cherry, L.J.

as executor and trustee, was responsible, showing their total amount to be at that date £713 12*s.* 1*d.*

I do not think it necessary to examine in detail all the accounts subsequently delivered by Donaldson to the plaintiffs. It does not seem to me to matter very much whether they were written on bank paper or not, or whether Donaldson signed them, as he sometimes did, with his name only, or whether he added, as he at other times did, the words "executor and trustee of Peter Malone, deceased." They are all cash accounts, and apparently continuations of the first account contained in the document of the 17th July, 1888. None of them includes the principal sum due on the mortgage, which would necessarily be included in any account of the trust funds. I therefore arrive at the conclusion that these are all accounts delivered by Donaldson, as bank manager, to the plaintiffs as customers of the bank, giving them a statement of the moneys then to their credit in the bank. It was undoubtedly within the scope of his authority as bank manager to deliver such accounts, and the defendants are, in my opinion, bound by them, and estopped from setting up any case of relief from liability inconsistent with them. Having arrived at this conclusion, it is unnecessary for me to say more; but I ought, perhaps, to refer to the transaction as to the deposit receipt, and the yearly items of £12 for interest on the mortgage, which stand on a slightly different basis from that of the proceeds of the policy.

As regards the deposit receipt for £300 and interest, I really cannot understand what possible defence the bank has to the plaintiffs' claim in respect of this sum. It never formed portion of the trust funds of Peter Malone deceased, at all; nor did it ever come to Donaldson's hands as trustee or executor of Peter Malone. We have to deal here with an ordinary banking transaction of the simplest possible character. The mother of the plaintiffs, having £300 standing in the joint names of herself and her daughter Ellen, on deposit receipt, in the bank, desired to make it over to her four daughters, and accordingly endorsed the receipt, and handed it to Ellen; she on behalf of herself and her sisters, desiring to secure the higher rate of interest which the bank, through Donaldson, was allowing them on their policy

moneys, brought the receipt, duly endorsed, to the bank. Instead of receiving cash for it, as she would of course have been entitled to do, the plaintiff Ellen Malone handed the deposit receipt not to Donaldson, but to another official behind the counter, telling him that she wanted that money added to their other money then in the bank. If the defendants' case is good in point of law as regards the policy moneys, she should have been at once told that there was no money of theirs in the bank, and the amount of the deposit receipt and interest should either have been paid to her in cash, or a new deposit receipt should have been given to her. But neither course was adopted, the bank accepted the receipt as representing money, through the unnamed official, upon the terms stated by the plaintiff Ellen Malone, and has kept it from that day to this. In the first account furnished by Donaldson, after this transaction, the amount (£313 4*s.*) of this deposit receipt and interest appears as a separate item. In all subsequent accounts (including that sued on in this action) it is merged in the general balance due to the plaintiffs. Surely it cannot for a moment be contended that because Donaldson, undoubtedly in this matter acting as bank manager, omitted to make any entry in the bank-books of this deposit of £313 4*s.*, but lodged the amount to his own credit instead, the liability of the bank to the depositors was thereby discharged; Mr. Henry cited to us as an authority for holding the bank liable to make good this sum, the case of *Thompson* v. *Bell* (1). If the deposit receipt had been given by Ellen Malone to Donaldson himself, it might have been necessary to refer to this case as an authority for holding the bank liable, as the transaction might possibly, in that event, have been represented as a private one between the plaintiffs and Donaldson; but the document having been handed to another official in his own place at the bank counter, no authority is, I think, necessary to establish the liability of the bank. In the recent case of *Lloyd* v. *Grace, Smith, & Co.* (2), which was relied upon by the defendants' counsel here, I find Farwell, L.J., in the course of his judgment putting by way of illustration a case very similar to, though not quite so strong as,

(1) 10 Exch. 10.

(2) [1911] 2 K. B. 489

Appeal. 1912. MALONE v. BELFAST BANKING CO. Cherry, L.J.

the case here as to the deposit receipt. "If I pay cash," says he (1), "into the credit of my account across the counter of a bank, and the cashier pockets it instead of putting it into the till, the bank is liable because he is there both to accept and to give a final receipt for it." Here the fraudulent appropriation was not by the official who received the deposit receipt, but by the bank manager, who could only have obtained possession of the document as bank manager, and who regularly after that date furnished accounts admitting its receipt. How can the liability of the bank be disputed under these circumstances?

There remains only the question of the annual sums of £12 each paid regularly by the plaintiffs' mother as mortgagor to Donaldson as mortgagee in trust for the plaintiffs. These payments were made by a cheque, which was handed to Donaldson each year when he came to the plaintiffs with his annual statement. The case against the bank is not so clear as regards these moneys as it is in respect of the deposit receipt. The transactions did not take place in the bank, and Donaldson, in receiving the money, was undoubtedly acting as trustee. The arrangement was, of course, as plaintiffs understood, that each annual sum should be added to the money which the plaintiffs believed was deposited in their names in the bank; and inasmuch as the accounts, regularly furnished, represented this as having been done, I think there was evidence to support the finding of the jury that these sums were "paid to the bank to be invested in the bank at a fixed rate," and that the defendants are, therefore, liable for them in the same way as for the other moneys.

So far, indeed, as the action is based upon an account stated and settled, no distinction can be drawn between any of the sums received. They all became absorbed finally in the "balance to credit" item, £1421 10s., as set out in the account furnished on 5th February, 1909; and if the bank is liable in this form of action for any of these sums, it must be liable for all. For the reasons I have already stated I think that it is so liable.

As to the plea of the Statute of Limitations, rather faintly relied upon by the defendants' counsel, though regularly pleaded

(1) [1901] 2 K. B. at p. 510

in the statement of defence, it is only necessary to say that if these accounts are binding upon the defendants, as we all hold that they are, they are a complete answer to this plea. The last of them was furnished less than two years prior to the issue of the writ.

Appeal.
1912.
MALONE
v.
BELFAST
BANKING CO.

Cherry, L.J.

Solicitor for the plaintiffs: *James Mullan.*
Solicitor for the defendants: *John Malone.*

R. ST. J. C.

JOHN MINFORD *v.* ROBERT ERNEST CARSE AND WILLIAM HUNTER (1).

K. B. Div.
1911.
May 12.
Appeal.
1911.
Nov. 27, 28, 29.
Dec. 14.

(1911. No. 1133.)

Executors—Lease—Liability for rent—Measure of—Administration action—Receiver—Rent payable in advance.

The executors of a deceased lessee entered into possession of the demised lands, the rent of which (£140) was payable in advance on 1st November in each year. Within two months of the lessee's death an order for the administration of his estate was made in a creditor's suit which had been instituted in the Court of the County Palatine of Lancaster, and a receiver was appointed by the Court, who took possession and complete control of the leasehold premises, and took any profits arising therefrom, accounting for the same in the Court which had appointed him. In an action to recover one year's rent which became due in advance on the following November, brought against the executors, who pleaded, *inter alia*, that the leasehold premises were of no value, and that they had been unable and would during the period in respect of which the rent was claimed be unable to derive any profit or advantage out of the leasehold premises, the jury were unable to say whether the executors could have made any profits out of the premises, and the learned Judge at the trial thereupon gave judgment for the plaintiff for the year's rent. No question was left to the jury as to the value of the premises, although there was evidence that they were not value for the rent.

Held, by the King's Bench Division and the Court of Appeal, that the judgment should be set aside.

(1) In the King's Bench before PALLES, C.B., and KENNY and WRIGHT, JJ.

K. B. Div. 1911.

MINFORD v. CARSE.

Held, by the King's Bench Division, and by Cherry, L.J., that the measure of the personal liability of the executors was the value of the premises; that their personal liability to this extent was not extinguished by the possession of the receiver, and that as the question of value had not been left to the jury there should be a new trial.

Held, by the Court of Appeal (The Lord Chancellor and Holmes, L.J., *diss.* Cherry, L.J.), reversing the judgment of the King's Bench Division, that the personal liability of an executor who has entered into possession of a testator's leasehold property is limited to the profits which he makes, or by the exercise of due care, skill, and diligence could make, out of them; and that the appointment of the receiver, and the possession by him of the premises under the authority of a Court of competent jurisdiction, precluded the executors from making any profit during the period for which the rent claimed was payable, and that they were consequently entitled to have a verdict entered for them, and further, that the action was premature, as it would be impossible at the beginning of a year to ascertain by anticipation what profits could be made out of a particular holding during the ensuing twelve months. The protection afforded to an executor by an order for the administration of the testator's estate considered and explained by the Lord Chancellor.

ACTION for rent under a lease, commenced by specially indorsed writ. The indorsement was as follows:—

1. By an indenture of lease, dated the 25th November, 1896, the plaintiff demised to Robert Patterson Carse, All that and those that piece or parcel of land, with the ten cottier houses thereon, situate in the townland of Burnside, barony of Upper Antrim, and county of Antrim, and also the use and enjoyment of all the beetling engines, machinery, fixtures, implements and utensils which adjoin said premises and constitute what is commonly known as the Burnside beetling engines, with the water-power rights and other rights and easements thereunto belonging, and heretofore held and enjoyed, the particulars of which machinery are specified in the schedule to the said indenture of lease annexed, to hold from the 1st November, 1895, for the term of twenty-one years, subject to the yearly rent of £140, payable yearly in advance on every 1st day of November.

2. The said Robert Patterson Carse died on the 6th January, 1910, having previously made his last will, whereof he appointed the defendants executors; and the defendants thereupon entered into possession of the said premises, and paid to the plaintiff the year's rent which had become due on the 1st November, 1909.

3. £140, being one year's rent of the said premises, became due and owing by the defendants to the plaintiff on the 1st November, 1910, and the same remains due and unpaid.

The plaintiff claims the said sum of £140.

The defendants delivered their statement of defence, which was as follows:—

1. The defendants admit the execution of the lease of the 25th November, 1896, mentioned in the statement of claim, and refer to the terms thereof when produced.

2. The defendants never entered into possession of the premises demised by said lease.

3. The said premises are now and have been since the 1st November, 1910, of no value as a source of profit as a beetling mill, for which the same were demised by the said lessee, or for any other purpose whatsoever.

4. The defendants have not since the 1st November, 1910, received any profits whatsoever out of the said premises.

5. In pursuance of an order of the county Palatine Court of Lancaster, dated the 28th February, 1910, a receiver was duly appointed over the said premises as receiver and manager of the same, and of the business carried on therein, in a suit for the administration of the estate of Robert Patterson Carse, deceased, entitled—

'In the matter of the estate of Robert Patterson Carse, deceased. Between Walkington & Sons, Limited, plaintiffs, and Robert Ernest Carse, and William Hunter, defendants.

6. Since the date of the said last-mentioned order, the said premises have been, and the same now are, in the possession and under the control of the said receiver so appointed as aforesaid.

7. By reason of the appointment and possession of the said receiver, the defendants have been unable, are now, and will be, during the period in respect of which the rent claimed to be due has become payable, unable to derive any profit or advantage out of the said premises or any part thereof, or to deal in any way therewith.

8. The defendants admit the payment of the year's rent which had become due on the 1st November, 1909, but as a

K. B. Div. 1911.

MINFORD v. CARSE.

debt due by the said Robert Patterson Carse, in his lifetime. The defendants will submit at the trial of this action that the payment of the said rent last mentioned does not entail liability upon them by way of entry into the said premises, and that the action is not sustainable against them.

The plaintiff joined issue, and submitted that the defence did not disclose any answer to the plaintiff's claim in point of law.

The action was tried before Boyd, J., and a common jury, at the Belfast Spring Assizes, 1911. The plaintiff proved the execution of the lease, which was to the effect stated in the special endorsement on the writ of summons. It contained a clause against alienation without the consent of the lessor in writing. The plaintiff in his evidence alleged that the lessee's business was carried on by the executors till the 10th December, 1910. In February, 1910, the keys of the demised premises were offered him by the defendant, Robert E. Carse, but the plaintiff refused to take them. He said he had better offers before Carse took the premises in 1896, and could get £140 a year for them now. He was informed by letter of the 30th May of the English administration suit. He knew of the appointment of the receiver (Mr. Price). He also said in his evidence, "I cannot say how much profit Carse could make out of the premises—they are always worth the rent."

Mr. Price, the receiver, was examined on behalf of the defendants. He said that he came over and took possession of all the property on 6th March. He appointed the defendant, Carse, manager of Whitepark (part of the property of the deceased), and Mr. Parks manager of Moorfield (another part), and of Burnside. All the management of the business was by witness, and Carse had nothing to say to it. Witness tried to sell the place in May. It was impossible to say if any profits were made out of it. One man was employed, and he lived on the premises. A small business was done at Burnside, after Carse's death. Witness, on the 6th May, sent a cheque to pay wages to Mr. Caruth, who was acting for witness as receiver when he took possession.

On cross-examination Mr. Price stated that he did not take up possession from any specific person, he did not go to Burnside or Moorfield. The money that was in bank at the death of the deceased was handed to witness by the defendant, Carse. The business was managed by a clerk. Beetlers are necessary. Carse had the key, and he got it from the worker in charge. The wages were paid by Hunter and Carse. Witness was in possession. The rent of the small house in which the man lived was deducted from his wages. It would have been necessary to beetle elsewhere if witness, as receiver, had not possession of Burnside.

The defendant, Carse, deposed that he was manager of Whitepark, and had very little to say to Burnside, which was worked as an adjunct to Moorfield. Hunter only came down once after the testator's death. The wages had to be paid to keep the business going. These were paid by the manager of Moorfield, since the 21st of February. Witness concluded his direct examination by stating: "I have taken no part in the management of the premises. No profits could have been made out of the business, and as a fact there was a loss." Witness on cross-examination stated that money came in between the 6th January and 21st February, and witness and Mr. Hunter signed cheques drawn on the account, "Moorfield and Whitepark Co.," which was the account his father had.

The defendant, W. Hunter, deposed that he never saw the premises. Any money that came in was disposed of by the executors.

The orders for administration, and appointing the receiver, both dated 28th February, 1910, were given in evidence.

The learned Judge asked the counsel on both sides what questions they desired to be left to the jury. The following questions were submitted to the jury:—No. 1 at the request of Harrison, K.C., on behalf of the plaintiff, and the others at the request of Chambers, K.C., on behalf of the defendants.

First, did the defendants enter into possession of the premises demised by the lease of the 25th November, 1896? Answer—"Yes."

Second, if so, for what period did such possession continue? Answer—"6th March, 1910."

K. B. Div. 1911. MINFORD v. CARSE.

Third, could they, during the continuance of such possession, have made any profits out of such premises? Answer—"Cannot say."

Fourth, if so, what amount? Answer—"Cannot say."

After the jury retired, Harrison, K.C., asked the Judge to leave to the jury the further question, "Could the defendants have made enough out of the premises to pay the rent?" and to tell them there was no evidence given by the defendants to prove that they could not, and that the onus of such proof lay upon the defendants. The learned Judge declined to give any further directions.

No further objection was taken to the charge; and on the return of the jury with the answers above stated, Harrison, K.C., asked for judgment for the plaintiff, and the learned Judge gave judgment for the plaintiff for £140 and costs.

The defendants applied to the King's Bench Division to set aside the judgment, and to enter judgment for the defendants, or in the alternative for a new trial, on the grounds of misdirection and non-direction by the learned Judge, and that there was no evidence proper to be submitted to the jury that the defendants were in possession of the premises during any portion of the period in respect of which the rent sued for accrued due, or had, or could have, made any profits thereout during the said period, and that, on the findings of the jury and the admitted facts, the defendants were in law entitled to have judgment entered for them.

D. M. Wilson, K.C. (with him, *Chambers, K.C.*, and *Young*), for the defendants in support of the motion.

Gordon, K.C., and *R. F. Harrison, K.C.* (with them, *Charles Murphy*), for the plaintiff.

PALLES, C.B. :—

There are two questions to be determined—(1) Did the fact that possession of these beetling mill premises was taken by the receiver terminate the personal liability of the defendants to the

rent: (2) Was there evidence to go to the jury that the premises were not value for the rent reserved, £140?

I am of opinion that the fact that possession was taken by the receiver does not terminate the liability of the defendants. According to my recollection, the possession of a receiver, was never treated as regards head landlords, as taking the possession out of the person over whom the receiver was appointed. Where a leasehold interest was mortgaged, and a receiver was appointed over the mortgagor's possession, it never was held that the liability of the mortgagor to the landlord did not continue, although of course the head-rent ought primarily to be paid by the receiver, and although the head landlord, before taking proceedings to recover it, should, out of respect for the Court, apply to it for its permission to do so. Such permission was never refused unless the Court could make arrangements for the payment of the head-rent, *aliunde*. The cases under the Land Acts, to which we have been referred, reflect that former practice; for example, a lessee, over whose possession a receiver has been appointed, is still held to be in possession for the purpose of fixing a fair rent. We are asked to draw a distinction between cases of that kind and a case like the present, in which a defendant executor is sought to be made personally responsible on the covenant in the lease. I do not think that distinction can be drawn. The plaintiff is not claiming here through the administration, but above it. The liability sought to be imposed here on the defendant is one of a personal character, although that liability originated in his being executor. By reason of being executor he is assignee and liable as assignee, although to a modified amount only, and it is his liability as assignee that is sought to be enforced in this action. The principle is clearly shown in the judgment of North, J., in *Re Bowes* (1), upon which I am quite content to rest my judgment. The observations of the learned Judge on pages 137 and 138 in reference to the arguments that the proceeding there taken by the landlord, viz., by intervening in an administration suit, were irregular, in fact, decide the matters I have mentioned. I therefore hold that, notwithstanding the appointment of the receiver,

(1) 37 Ch. D. 128.

K. B. Div. 1911.

MINFORD v. CARSE.

Palles, C.B.

the defendants here must be deemed to have been in possession during the period in which this rent accrued due.

The second question is one of a different nature. It has been complicated by some matters that, notwithstanding the greatest care, will occasionally arise in the conduct of a case at *nisi prius*. I think that it has been thoroughly established—established long before the two cases, *Hopwood* v. *Whaley* (1); and *Hornidge* v. *Wilson* (2), to which Mr. Wilson has referred us—that the extent of the liability of a defendant in a case of this description is the value of the occupation of the premises during the time in question. No doubt in a number of the old cases, and in text-books in which the words of these old reports have been reproduced, the liability was at one time treated as dependent upon the amount of the rent received, and, later on, upon the amount of the rent received, or which might have been received; and in some cases the learned Judges have referred to the word "profit," a word which has, I think, caused some misapprehension in the present case. But now it is thoroughly settled that the extent of the liability in cases like the one we are dealing with is the value of the premises. It is unfortunate here that the expression used in the plea is that the defendants were unable to derive "any profit or advantage." The plea, however, does state what, I think, would make it a good plea, viz., that the premises were of no value. But the expression in reference to profits did, I think, lead to some irregularity at the trial. It may have been that the trial was fought, at least by the defendants, upon liability being dependent upon profits. In reference to that, I may say that even the modern cases treat the question of value as being one to be determined by profits received, or which might have been received. Ultimately, the question left to the jury, at the request of the defendants, was one that was dependent on profits; and I think it is possible that the jury were misled by that. However that may be, there is a plea here which stated that the premises were of no value, and if there were evidence that the premises were of less value than the amount of the head-rent, it would be impossible that the plaintiff could sustain a verdict for a greater

(1) 6 C. B. 744. (2) 11 Ad. & E. 645.

amount than the value of the premises. Consequently, if there was evidence that this beetling mill was of less value than £140 a year, there has been no finding on a material question. Is there any evidence that these premises were not worth £140 a year? I cannot say that there is not. The receiver says he is unable to say whether or not there were any profits. I understand the evidence in this way—This beetling mill was worked in conjunction with another part of the works, and in order to ascertain whether the beetling mill was making a profit, you should take the account of the profits of the whole concern, and then, when you found that a profit was earned by the working of the whole concern, you should distribute that between the beetling mill on the one hand and the Moorfield premises on the other. I understand the receiver as saying that that had not been done, and that he was not able to say if there was a profit out of the beetling mills; or if there was, what the amount of it might be. I therefore leave his evidence out of consideration. Mr. Carse, however, says: "As a fact, no profit could have been made out of the business, and as a fact, there was a loss." This, I think, is some evidence that these premises were not worth £140 a year, or were practically of very little value. I am much affected by the jury having disagreed upon this question as to profits, and, I decline to hold that there was no evidence to go to the jury upon the real question that ought to have been submitted to them, viz., Were the premises of less value than £140 a year, and, if so, say how much less?

I am therefore of opinion that this judgment and verdict ought to be set aside, and that there ought to be a new trial.

KENNY and WRIGHT, JJ., concurred.

J. M.

The defendants appealed to the Court of Appeal. There was a cross-appeal by the plaintiff, seeking to uphold the verdict and judgment for £140. The case was first argued during the Trinity Sittings, 1911, before Sir Samuel Walker, L.C., and

Appeal. 1911. MINFORD v. CARSE.

Lords Justices Holmes and Cherry, judgment being reserved, and, in consequence of the death of the late Lord Chancellor, the case was directed to be reargued before the present Lord Chancellor (the Right Hon. R. J. Barry) and the Lords Justices.

Chambers, *K.C.*, and *D. M. Wilson*, *K.C.* (with them *R. C. Young*), for the defendants :—

Of course it is impossible that the judgment for £140, which the learned Judges entered at the trial, can stand. It is plain that it was in excess of the value of the land, whether considered as equivalent to the amount of profits which might have been obtained by the exercise of reasonable and due diligence, or otherwise. But we object to the judgment of the King's Bench Division, so far as it directs a new trial, as we submit the defendants are entitled to have a verdict entered for them.

The measure of the liability towards the lessor of the executor of a deceased lessee, who enters into possession of lands demised at a rent, is the profit he makes, or by the exercise of due diligence, knowledge, skill, and care, could make out of them. Under the old law he was chargeable in the *debet* as well as the *detinet*, whether he had assets or not, but in respect of what? The perception of the rents and profits : *Helier* v. *Casebert* (1); *Buckley* v. *Pirk* (2); *Hopwood* v. *Whaley* (3), where the questions left to the jury were, first, "Whether the defendants had in fact derived any profit or advantage from the premises, and if so, to what amount"; secondly, "Whether he might by the exercise of reasonable diligence have derived profit or advantage therefrom, and, if so, to what amount." To the same effect was the view of Lord Denman, in *Rubery* v. *Stevens* (4). The jury here were unable to say whether any profit could or could not have been made by the defendants. They did find that they ceased to be in possession of the premises on the 6th March, 1910, when possession was taken by the receiver appointed by the Vice-Chancellor of the Duchy of Lancaster, and there is no pretence that any profits could have been made in the interval between the testator's death and that date. The question

(1) Levinz, 127.
(2) 1 Salk, 317.
(3) 6 C. B. 747.
(4) 4 B. & Ad. 241.

was raised in the Court below, that, notwithstanding the appointment of the receiver, and his act in taking possession—physical and actual possession—of the whole property, a constructive possession of these demised lands by the defendants continued and carried with it the liability which the plaintiff seeks to establish. This contention is utterly untenable, and would lead to most dangerous consequences. The law and practice relating to receivers by the Court of Chancery have long been clearly settled. Any interference with the possession of the receiver of property over which he has been appointed is a contempt of Court, entailing swift, summary, and severe punishment. Possibly the most aggravated form of the offence would be where the interference comes from the dispossessed owner of the property. It may be true that the Court avoids as far as possible disturbing the rights of third parties; but even these cannot be enforced against the receiver without application to the Court for leave to do so. But it is certain that the defendant in the suit, the person over whose property the receiver is appointed, cannot resume possession, work it, make a profit out of it, or otherwise intermeddle with it in any way whatever. If, as sometimes occurs, the owner is employed by the receiver as manager, he must account with the receiver for all profits; and he would have no right to apply the profits for any purpose, except under the direction of the receiver. All outgoings are paid by the receiver if he has funds to meet them. The proper course for the lessor to have taken would have been to apply to the Court for an order on the receiver to pay the headrent, or in the alternative for leave to bring an ejectment. But instead of doing this he seeks to make the defendants personally liable for the reserved rent, though it was impossible that, after the 6th March, 1910, they could have made any profit out of the premises which would be at their disposal for the satisfaction of headrent, or otherwise.

It may also be said that independently of the appointment of the receiver, the administration decree in itself gives the executors protection: *Fitzpatrick* v. *M'Glone* (1); *Dean* v. *Allen* (2); *Bennett* v. *Lytton* (3); *Waller* v. *Barrett* (4); and

(1) [1897] 2 I. R. 542.
(2) 20 Beav. 1.
(3) 2 J. & H. 155.
(4) 24 Beav. 413.

Appeal. 1911. MINFORD v. CARSE.

the reason Courts have refused to set aside, and retain a fund for the indemnity of executors, is that the decree itself is a sufficient protection to everyone acting under and in pursuance of it: see judgment of the late Vice-Chancellor in *Buckley* v. *Nesbitt* (1), following his unreported decision in *Fitzgerald* v. *Lonergan*, which was affirmed on appeal (2).

But further, this action was commenced on the 27th January, 1911, for rent payable in advance on the preceding 1st November. If we are right in submitting that possible profits during the year is all that could be recovered, how could the executors ascertain by anticipation what those profits would be, or how could a jury estimate them, or give any other answer than was given here, "Cannot say"?

Ronan, K.C., and *Gordon, K.C.* (with them *Harrison, K.C.*, and *C. Murphy*), for the plaintiff:—

The modern authorities on the subject establish that the true measure of the liability of an executor who enters into possession of his testator's leasehold to the lessor is the value of the premises: see *Randall* v. *Andreae* (3), a case tried without a jury before A. L. Smith, J., who in a considered judgment reviewed all the preceding cases. He says, at p. 633, that the executor by entry makes himself personally liable as assignee, although "he may then, by proper pleading, limit his liability for rent to the yearly value the premises might have yielded." And at the close of his judgment, p. 634, he treats the law as having been accurately and sufficiently laid down by North, J., in *In re Bowes*; *Strathmore* v. *Vane* (4). There, at page 134, the rule, as the result of an examination of the antecedent authorities, was stated thus—"He," the executor, "is liable for the actual value of the premises for the time during which he held the premises as assignee." The rule was recognized by Channell, J., in *Whitehead* v. *Palmer* (5). If this be so, there can be no difficulty in ascertaining the value at the commencement of the

(1) 5 L. R. I. 199.
(2) 9 Ir. L. T. R. 186.
(3) 61 L. J. Q. B. (N. S.) 630.
(4) 37 Ch. D. 128.
(5) [1908] 1 K. B. 151.

year for which the rent is payable. Prospective value is ascertainable as well as actual value. It has been done in multitudes of cases by the Land Commission in fixing fair rents. If the defendants had proved a yearly value of the lands less than the rent under the lease, they would be free from any further liability. But the onus of proving this lay upon them, and they did not attempt to discharge it. Therefore, Boyd, J., was right in entering judgment for the year's rent, and the plaintiff is entitled to the judgment so entered.

As to the appointment of the receiver it could not affect the liability of the defendants or interfere with the rights of the lessor to his rent: *Sutton* v. *Rees* (1), *per* Kindersley, V.-C., although he may have to obtain leave of the Court appointing the receiver for the assertion of his rights. The subject was fully considered by this Court in the year 1890 in *Moir, Tenant*; *Blacker, Landlord* (2), where, notwithstanding the appointment of a receiver over the lessee's interest in the holding, it was held that the lessee remained in *bona fide* occupation, and was consequently entitled to fix a fair rent. Lord Ashbourne, at p. 378, says—"The possession of the receiver cannot of itself be held to put the tenant out of occupation"; and FitzGibbon, L.J., p. 379, describes the position thus—"The receiver was regarded as merely managing for the tenant, who was the occupier for every legal purpose." And Barry, L.J., adopts the phraseology of Mr. Commissioner FitzGerald in the Land Commission—"The occupation of the estate is not changed, but merely a mode of management is directed by the Court through its officer, as a common agent for all parties." The rights of the parties are unaltered by the appointment of a receiver over the property in which they are interested: *Groom* v. *Blake* (3). In *The Commissioners of Church Temporalities* v. *Harrington* (4), the late Vice-Chancellor said, at p. 136—"When a receiver is appointed by this Court over the estate of a defendant, the correlative rights of landlord and tenant, as subsisting previously between the defendant and his tenants, are not changed. The Court, by its officer, takes

(1) 9 Jur. (N. S.) 456.
(2) 26 L. R. I. 375.
(3) 6 Ir. C. L. R. 400; 8 Ir. C. L. R. 428.
(4) 11 L. R. I. 127.

Appeal. 1911. MINFORD v. CARSE.

upon itself the possession previously existing in the defendant, and though it has additional powers of enforcing the landlord's rights, as formerly by attachment, and still by sequestration, the rights to be enforced remain unaltered." To the same effect are the views of the leading text-writers: 2 Daniell's Ch. Pr. (7th ed., 1440; Kerr on Receivers (5th ed.), 178.

D. M. Wilson, K.C., in reply.

Sutton v. *Rees* (1), and the other cases cited with reference to the effect of the appointment of the receiver, must be read in connexion with the particular facts existing in each. No doubt the Court appointing a receiver endeavours to preserve the rights of all parties *in statu quo*, but it takes possession of the property, and displaces effectually the physical possession of anyone else. Interference with it, even by the owner, except by leave of the Court, is a contempt of Court punishable by attachment. In *The Commissioners of Church Temporalities* v. *Harrington* (2) the rent in dispute was paid to the head landlord under stress of an ejectment brought by leave of the Court.

In *Hornidge* v. *Wilson* (3) the executor was relying on a reduction in value caused by his own neglect in not executing repairs for which he had covenanted, and in omitting to let to a solvent sub-tenant.

Dec. 14.

THE LORD CHANCELLOR:—

The plaintiff and the defendants have both appealed in this case against an order dated May 12th, 1911, made by the Divisional Court, setting aside a judgment for £140 entered for the plaintiff at the last Belfast Spring Assizes, and directing a new trial of the action. The defendants have appealed with a view that judgment may be entered for them, and by a cross-appeal the plaintiff claims to have the judgment ordered at the trial restored. The defendants are the executors under the will of Robert Patterson Carse, who died on January 6th, 1910, and the question involved relates to the personal liability of the executors in respect of the rent of a certain

(1) 9 Jur. (N. S.) 456.
(2) 11 L. R. I. 127.
(3) 11 Ad. & E. 645.

leasehold property held in the county of Antrim, by the testator under a lease dated November 25th, 1896, and made to him by the plaintiff. The property consisted of a piece of land, with ten cottier houses thereon, situate at Burnside, county Antrim, and the lease also granted the use and enjoyment of certain beetling engines upon the lands, and of the water and other rights connected with them. The term of the demise was twenty-one years from November 1st, 1895, and the yearly rent £140, payable yearly in advance on every 1st day of November. There was a covenant by the lessee against assignment or sub-letting. The demised premises were used by Robert Patterson Carse during his life for the purposes of his business. Upon his death probate of his will was granted to the defendants as his executors on February 15th, 1910, and the jury at the trial in Belfast found that the defendants entered into possession of the premises, and that their possession continued up to March 6th, 1910. On February 18th, 1910, three days after the grant of probate to the defendants, a creditor of the deceased issued a writ out of the County Palatine Court of Lancaster claiming an administration under the Court of the deceased's estate. A decree accordingly was made by the Court on 28th February, 1910, for the administration of the estate, and a gentleman named Henry Lloyd Price, an accountant, who had on February 21st been appointed as interim receiver, was, on the day when the decree was pronounced, appointed receiver over the deceased's property, including the aforesaid demised premises, and was directed to manage the business therein of the deceased, and to obtain all documents from the executors. An account was passed by the executors of the property they had received, and the whole property, including the premises at Burnside, were, under the direction of the Court, handed over to the receiver. The receiver came over from England, and on March 6th, 1910, took possession of the Burnside holding, and has since retained it, managing it and using it under the direction of the County Palatine Court, and duly accounting to the Court for all receipts and expenditure in connexion therewith. Since the date, March 6th, 1910, the defendants have not been in the occupation of the premises, and have had no control or management of them, and have never received any rents, receipts, or other profits

Appeal. 1911. MINFORD v. CARSE. The Lord Chancellor

therefrom, all the proceeds of the said lands and premises having by the Court's order been taken by the receiver, and accounted for, not to the executors, but to the Court under the Court's direction. The facts I have stated are unchallenged. They were stated during the argument in this Court without objection or question, as, no doubt, they also were before Mr. Justice Boyd at the trial in Belfast.

Due notice of the administration suit in the County Palatine Court was given to the plaintiff on May 30th, 1910, and the plaintiff by his own admission was aware that Mr. Price had been appointed receiver over the deceased's estate. It is right to state that it was proved by the defendant, William Hunter, that he personally never even saw the premises in his life. That fact, to my knowledge, was never questioned, though it was proved that Hunter signed certain cheques. They were probably connected in some way with the Burnside business, but the fact was not clearly proved. There was another business of the deceased carried on near the Burnside premises, and to some extent connected with it, and it would appear that Hunter did, for a short period, intervene in that.

The rent which became payable on the 1st November, 1910, was not paid. No evidence appears to have been given of any request or demand being made for it in any quarter, either to the executors or to the receiver. No claim was made to the County Palatine Court. On the 27th January, 1911, the plaintiff issued the writ in the present action, claiming against the defendants as a personal debt the sum of £140, payable in advance on November 1st, 1910. A statement of defence was in due course filed and delivered by the defendants, denying liability on the various grounds disclosed, including the appointment of the receiver in the course of the administration action, and pleading in substance that the premises had been of no value to them since November 1st, 1910. It was pointed out that the receiver had been appointed on February 28th, 1910, and that since March 6th, 1910, he had been in the possession and control of the premises. At the trial in Belfast the jury found that the defendants had entered into possession of the demised premises, and remained in possession until the 6th March, 1910, but they disagreed on the further

question put to them, namely, whether the defendants could, during their possession, have made any profits out of the premises. The learned Judge thereupon entered judgment for the plaintiff for the sum of £140, the full amount claimed.

It is no doubt settled law that a lessor can sue the executors of a deceased lessee who have entered on the leasehold, either personally as assignees of the lease, or as executors with reference to the assets of the deceased. If such executors be sued personally, speaking generally, it can also be said that a personal judgment will be given against them for rent which accrued due since the testator's death. If no question be raised by executors in such an action, the amount of the contract rent would be the basis of the judgment, which when obtained would be enforceable personally against the executors. But it is absolutely settled that if the executors raised the contention that the premises had not a value to them, and could not by any reasonable care and diligence have produced rent and profits equal to the amount of the rent, then their personal liability would not be measured at the figure of the rent, but at the sum which would be determined to be the value of the premises, in the sense I have indicated. That was plainly stated by the Lord Chief Baron in his judgment in this case. He said it was thoroughly determined that the extent of the liability in such a case was the value of the premises. From what I have said, it will be at once perceived that the position of the executor in such circumstances is not that of an ordinary assignee. He is sued, no doubt, as an assignee, but his liability stands on a different basis. Independently of any question of profits, the ordinary assignee is answerable for the full amount of rent contracted to be paid by the original lessee, and no one has ever put forward on the part of an assignee the plea that the premises were in fact of value to him only to an amount less than the stipulated rent. His liability in respect of the whole rent is absolute. On this subject Mr. Justice North, in the case of *In re Bowes* (1), makes an interesting statement at p. 131 of the report. The learned Judge said: "But a hardship may be inflicted upon the executor if he finds himself in possession

(1) 37 Ch. D. 128.

Appeal. 1911. MINFORD v. CARSE. The Lord Chancellor.

of property for which he has to pay full rent, and the property itself is not worth as much as the rent. Therefore, the law is, as the cases cited and several others clearly establish, that if the executor is sued as an assignee of the lease for the rent accrued, during the time in which he was in possession, he is entitled to set up by way of defence, that he is only assignee as executor, and that the profit or yearly value . . . of the property amounts only to a less sum than the rent." The learned Judge gave no explanation of the striking difference between the position of the ordinary assignee and that of the executor. Having called attention to the hardship that would in the case he was discussing fall on the executor, he added merely the words "Therefore, the law is," &c., as I have already quoted him. But the distinction between the two cases is of the highest importance in arriving at a view upon the question raised in the particular facts of the present case. Mr. Justice Channell, I find, in his judgment in *Whitehead* v. *Palmer* (1) says on page 157, "I am unable to say what is the logical reason for holding that an executor is liable for the value of the premises only, where the rent exceeds the value, but that is the law." There certainly could be none, if an executor in possession was to be treated as an ordinary assignee. No case that was quoted in the argument in this appeal, or that I could otherwise discover, was similar to the present case, in reference to the position of the defendants. In every one of them the executor was either himself in possession, or had the management of the property, and was in receipt of the rents and profits. The present case is unique in its special facts, and having regard to the appellants' argument, the problem is set to the Court to trace and determine what is the true foundation and measure of the executor's liability in such a case. The executor's liability as assignee will, I am of opinion, be found to depend on his perception of the rents or profits of the lands, or on his right to do so, by proper care and diligence. The matter is plainly indicated in *Helier* v. *Casebert* (2), where it is expressly stated, at p. 128, that "if the executor continues in possession, he shall be charged in *debet* and *detinet* in respect of

(1) [1908] 1 K. B. 151. (2) 1 Levinz, 127.

the perception of the profits, whether he has assets or not." That doctrine, as there stated, was quoted with approval by Lord Denman in *Rubery* v. *Stevens* (1), at p. 246. In his judgment in that case, Lord Denman also says that so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to anything else. He relied in that respect on *Buckley* v. *Pirk* (2). It was only the surplus, he manifestly thought, that could be regarded as assets of the deceased. Likewise it will be found in Foa (Landlord and Tenant), at p. 444, 4th ed. (1907), that it was the author's view that the fact that the executor had no assets will not exonerate him from liability for the profits received from the land, since they should have been primarily applied in discharge of the rent. Mr. Justice North, in his judgment in *Bowes' Case* (3), at p. 132, speaking of the executor as assignee, says, "What he is liable for is to account for what the actual value of the premises to him has been during the time in which the rent for which he is sought to be made liable had accrued, or the time he has been in possession . . . That is independently of any question whether that value has actually been received by the executor or not." The learned Judge was, I think, plainly considering the general case of an executor in the possession or management and control of the lands. When he is in such possession or control the lessor's right is not affected, for example, by the inability to obtain payment of rent from an insolvent sub-tenant, as in *Hornidge* v. *Wilson* (4), so much relied on by the respondent in this case. There the difficulty of the executor may have arisen from the imprudence in the letting, made either by the testator or the executor himself, or from some other cause or chance of life for which it would not be a reasonable thing to exonerate the executor from his liability to the lessor. Without pursuing the authorities further, the propositions I have quoted, in my view of them, afford a solution of the difficulty felt by the learned Judge in *Whitehead* v. *Palmer* (5), by showing the real foundation and

(1) 4 B. & Ad. 241.
(2) 1 Salk. 317.
(3) 37 Ch. D. 128.
(4) 11 Ad. & Ell. 645.
(5) [1908] 1 K. B. 151.

Appeal. 1911.

MINFORD v. CARSE.

The Lord Chancellor.

measure of the liability of an executor in possession. He receives, or should by proper care have been able to receive, the profits of the lands; and as they are primarily answerable for the rent, he is personally liable to make proper application of them by paying, in the first place, the rent due out of the lands. *If these profits*, in the sense I indicate, do not reach the full amount of the rent reserved, it is unquestionable that the personal liability of the executor will not be stretched beyond them, no matter what loss may fall thereby upon the lessor. The matters I have stated accordingly, in my opinion, reveal the true ground and extent of the executor's personal liability when sued as assignee. What, then, is to be said in the present case, where we know as a fact that no rents or profits from the lands in question were received by the defendants since March 6th, 1910. Everything that was obtained from the lands since that date, or could have been obtained from them, has passed into the hands of the receiver, who manages and controls them and receives the rents and profits out of them, under the express order and direction of the county Palatine Court. The receiver accounts for his receipts, whatever they are, to the Court, and is responsible to the Court alone for them. No account is rendered to the defendants as executors in the matter, and it is admitted that they could not deal with the lands in any way, much less take possession of the rents and profits, without a special order in that behalf on the part of the Court. No such order has ever been made, and the question therefore that arises is as to what the liability of the defendants is in a personal action brought against them by the plaintiff for the year's rent payable in advance on November 1st, 1910. If the liability of the executor, where he is an independent and free actor in the management and possession of the testator's leasehold, depends on his perception of the actual rents and profits, or on what he might have obtained by reasonable prudence and diligence, where, it is to be asked, does a personal liability arise, in a case in which, by the paramount power of a Court order, the executor does not participate, and would not be allowed to participate, in the rents or profits, or in any way to share the value of the lands? As I have already said, I have not found any case wherein in like circumstances a personal judgment was

given against the executor. To do so would, in my opinion, be opposed to the fundamental ground on which in the case of executors in possession a personal liability may be thrown on them by the owner for the rent payable since the testator's death. In the absence of any authority to the contrary, I cannot accept the plaintiff's view of the defendants' supposed liability in the special facts of this case, and on that view alone of the action, I should be of opinion that the demand fails. I naturally attach the greatest weight to what the Lord Chief Baron has said regarding the appointment of the receiver. In *Sutton* v. *Rees* (1), quoted in the argument in this case, the position is plainly stated. The landlord there had not distrained for the rent due to him, and on a sale of the furniture in the tenant's house by the receiver appointed in the case, the landlord claimed to have a lien on the proceeds of the sale. It was held that he should have applied to the Court for leave to distrain. The appointment of a receiver, it was said, does not affect the rights of the landlord, but the Court will not allow him to exercise those rights without leave first obtained. That case, so much relied on in this Court, does not, in my opinion, support the plaintiff's contention. Without dwelling on the circumstance that no leave to proceed was in fact obtained by the present plaintiff, I consider there is nothing in the decision to deprive the defendants of the defence I have already indicated, as being, in my opinion, available to them in the special facts of the case. Nor do I think the case of *Moir* v. *Blacker* (2) has, or was ever intended to have, the absolute range and effect insisted on before us, so as to exclude the defendants from making such a defence. The question in this appeal is, I think, quite independent of these decisions, for what we really have at this point to determine is the basis and measure of the personal liability for rent of an executor in possession of lands. If the liability be formed, as it appears to be settled that it is, on the perception of profits or right thereto I am unable to see anything in the decisions referred to to prevent the present defendants from contending that there can be no liability on them in this action, for the reason that they not merely did not

(1) 9 Jur. (N. S.) 456. (2) 26 L. R. I. 375.

Appeal. 1911.

MINFORD v. CARSE.

The Lord Chancellor.

take or receive any of the value of the land, but that it would have been admittedly a disobedience on their part to one of our Courts to do so.

Again, there is the fact that a decree for the administration of Robert Patterson Carse's estate had been made on February 28th, 1910, several months prior to the accrual of the rent claimed in this action. The situation created by a decree for administration, with reference to executors bound by the testator's covenants for the payment of rent, has been discussed in many cases, and the principle of the decisions is, in my opinion, entirely applicable in this case. I refer to *Dean* v. *Allen* (1) and to *Bennett* v. *Lytton* (2). On the question of providing an executor with an indemnity against the liability for rents, there is an important passage to be found in the judgment of Vice-Chancellor Kindersley in *Dodson* v. *Sammell* (3). It summarizes the effect of the cases I have referred to, and declares the settled law upon the subject. At p. 577 of the report, the learned Vice-Chancellor says :—"The only principle upon which the practice could stand must have been either that it was required as an indemnity to the executor or administrator, or that it was required for the protection and benefit of the lessor as covenantee. As to the ground of indemnity to an executor or administrator, it is difficult to reconcile such a ground with the acknowledged principle, now at least well settled, that a decree or order of the Court directing the administration and application of the assets is, of itself, a complete and perfect indemnity to him, provided that he keeps back nothing which ought to be disclosed to the Court. That principle was strongly and justly asserted by the Master of the Rolls in *Dean* v. *Allen* (1) and *Waller* v. *Barrett* (4). It seems strange that the Court should think it right to set apart a portion of the estate as a supplement to that indemnity, which is already complete and perfect." How can the principle of these cases be reconciled with the attempt made in the present action to maintain a personal claim against the defendants? The same view has been applied in two Irish cases, both being decisions of the late Vice-Chancellor. The first is

(1) 20 Beav. 1.
(2) 2 J. & H. 155.
(3) 1 Dr. & Sm. 575.
(4) 24 Beav. 413.

unreported, but the Vice-Chancellor's judgment in it was confirmed by the Court of Appeal. The particulars of it are set out in the second case, *Buckley* v. *Nesbitt* (1). It was also a case in which an executor applied for an indemnity against possible heavy liabilities in respect of the payment of rents. The head-note of the report is as follows :—"The decree of the Court in a suit for the administration of the personal estate of a deceased lessee is a complete protection to his personal representatives against all liability on foot of future breaches of the covenants in the lease, or of past breaches for which no claim has been made in the cause by the lessor; and, accordingly, where the deceased was a leaseholder for terms unexpired, at substantial rents, the Court, acting upon the rule of *Fitzgerald* v. *Lonergan* (2), refused to make any special provision out of the assets for the indemnity of the personal representative against future accruing rents." The facts, no doubt, are not the same as here, but the decision is, in my opinion, applicable. Referring to his previous decision, in which he was dealing with an administrator, the Vice-Chancellor followed the rule which he laid down in that case, as the settled practice of the Court. On page 205 it will be seen that, in dismissing the application, he said that his order was made on the principle which runs through all the cases, that a decree in an administration suit is a perfect indemnity to an executor. Further on, he says that the principle of the law of the Court was adopted by Lord St. Leonards' Act (22 & 23 Vict. c. 53), which merely substituted the right to administer out of Court for the right to do so in Court, and gave the executor who follows the steps prescribed in that Statute the same protection as he would have had under a decree of the Court. He added that he must refuse to give the executor any further indemnity than that which he will be given by the decree of the Court. In my judgment, it is a necessary conclusion from this and the other cases I have referred to, that in the circumstances of the present case, where the estate is being administered under the decree of a Court, the executors cannot be involved in a personal liability for the rent of the testator's leasehold, when the executors have acted, as they have in this case, in all things in

(7) 5 L. R. I. 199. (8) 9 Ir. L. T. R. 186.

Appeal. 1911. MINFORD v. CARSE. The Lord Chancellor.

good faith and in conformity with the directions of the Court. Otherwise it would not be possible for the Courts to withhold indemnities. The refusal to give them is based expressly upon the indemnity given to the executors by the decree of the Court.

The passage from the judgment of Ashurst, J., in *Allen* v. *Dundas* (1), relied on by the Lord Chief Baron in *Fitzpatrick* v. *M'Glone* (2), is based on the same general view. "The foundation of my opinion," said the learned Judge in that case, "is, that every person is bound by the judicial acts of a Court having competent authority, and during the existence of such judicial act the law will protect every person obeying it."

I will not prolong discussion on the argument of the defendants that the action was premature. How, it was asked by the defendants' counsel, could the defendants be required in a case where they contend the demised premises are of little or no value to pay in advance the full, or any particular, rent under the lease, without an opportunity being available for them, according to the law governing the case of executors personally sued, to prove what the value of the land has been during the year covered by the rent. No satisfactory answer on that subject was made by the respondents.

The plaintiff's claim in my opinion is not maintainable. The appeal of the defendants ought to be allowed, and judgment entered for them with costs.

HOLMES, L.J. :—

This action was brought to recover £140, a year's rent alleged to be due by the defendants under the lease of a beetling mill and ten cottier houses in the townland of Burnside, county Antrim. This lease, dated the 25th November, 1896, was made by the plaintiff to Robert Patterson Carse for the term of twenty-one years from the 1st November, 1895, the yearly rent of £140 being payable in advance on every 1st November.

The lessee died on the 6th January, 1910, having left a will which was proved by the defendants, the executors named therein. The statement of claim alleges that the defendants entered into

(1) 3 T. R. 125. (2) [1897] 2 I. R., at p. 550.

possession of the premises after their testator's death; and seeks to charge them, not in their representative character but personally. Very soon after the death of the lessee, an action was brought by Walkington & Son, Limited, creditors of his, in the county Palatine Court of Lancaster, for the administration of his assets. The executors were named as defendants, and by an order of the Palatine Court, of the 28th February, 1910, a gentleman called Price was appointed over the demised premises as well as over the other property of the deceased as receiver and manager of the same, and of the business carried on therein; and on the 6th March, 1910, he came to Ireland, and took formal possession of the property in this country, in which the business was carried on, consisting of Whitepark and Moorfield, in addition to Burnside. The notes of the trial with which we have been supplied appear rather meagre; and there must have been considerable documentary evidence which I have not seen. There are, however, some matters which can hardly be in dispute; and, fortunately, they are, I think, sufficient to enable the Court to consider and dispose of the questions discussed in the appeal.

The jury have found, and I believe rightly found, that the defendants entered into possession of Burnside after the death of the testator, and so continued until the 6th March, 1910. This finding implies that the jury were of opinion that the defendants' possession terminated at that date; and there is no doubt that they were led to this conclusion by what then occurred. Passing by for the present the legal effect of the action of the receiver as to technical possession, I am satisfied that the position of the executors was thereafter wholly altered.

The real manager of the business and of the premises in which it was carried on was Mr. Price. The executors accounted for all the assets of the testator received by them up to his appointment; and thereafter Mr. Price's was the hand to receive and pay; and amongst the debts discharged by him was the year's rent in advance, payable to the plaintiff on the 1st November, 1909. This had been in arrear at the testator's death; and was paid by the receiver's cheque in May, 1910. It has been admitted during the argument that from the 6th March the defendants not merely did not, but could not, have received any income from the demised

Appeal. 1911. MINFORD v. CARSE. Holmes, L.J.

premises, and that, whether their possession continued in a technical sense thereafter or not, those premises were of no value and could not have been made of any value to them.

What, then, was the effect of this state of things on the rights and liabilities of the parties to this action, which seeks to charge the defendants in their personal capacity with the rent of £140 for a year that was not ended until nine months after the issue of the writ? It is well settled that a lessor may treat the executor of the lessee who has entered into possession of the demised premises as assignee thereof, and sue him for the rent and for the breach of other covenants; but it is equally well settled that an executor so sued for rent may have a defence to the whole or part of such rent which would not be open to an ordinary assignee. He is entitled to set up as answer to the demand that he is only assignee by reason of his being an executor who had gone into possession, and that there were no profits obtainable from the premises, or, in other words, that the premises possessed no actual value.

Subject to what I shall say as to the meaning of the words "profits" and "actual value," it is unnecessary to show by authority that this is the law where an executor who goes into possession of a term of years belonging to his testator is sued as assignee for the rent thereof. Palles, C.B., referred in his judgment to only one case on the subject, *In re Bowes* (1), in which many of the earlier decisions are quoted, and where the principles to be derived therefrom are considered by North, J. He, as well as the Lord Chief Baron in the Divisional Court, criticizes the word "profits," which is to be frequently found in previous cases. North, J., says: "It seems to me that the word 'profits' does not accurately describe that for which the executor as assignee is liable. What he is liable for is to account for what the actual value of the premises *to him* has been during the time in which the rent for which he is sought to be made liable has accrued or the time for which he has been in possession." I quite agree that "profits" is ambiguous, and requires to be defined. It could not be construed as meaning the income the executor has actually

(1) 37 Ch. D. 131.

received while in possession. He may, through ignorance, carelessness, or want of skill, have realized nothing during his possession of premises which would have proved valuable if he had been a man of average industry and intelligence. North, J., seems to adopt the marginal note in *Hopwood* v. *Whaley* (1), which confines the liability of the executor *de bonis propriis* to the amount of profit which he might, by reasonable diligence, have derived from the premises. When profits are understood in this sense, the word is equivalent to the actual value of the premises during the time the executor has been in possession. The best, indeed I may say the only satisfactory, test of such actual value is what a skilful and industrious person could realize during his occupation. If the foregoing is the correct statement of the law, there would be no difficulty in applying it in ordinary cases. For example, if the defendants had entered into possession of leasehold premises of their testator, and continued in such possession until the action was brought; if there had been no decree for administration nor receiver appointed by the Palatine Court, and if the action, instead of having been commenced on the 27th January, 1910, for rent for the year ending on the 1st November following, had been begun after that date, the sole question for the jury would have been what was the actual value of the premises for that year.

But this is not an ordinary case. It bears no resemblance to any authority to which the Court has been referred. It is rendered peculiar by three things—(1) by the decree of the Palatine Court; (2) by its appointment of a receiver and his action; and (3) by the fact that the rent sued for was one year's rent, payable in advance on the 1st November, 1910.

No case has been quoted, and I know of no case, in which any of these peculiarities exist; and the questions to which they give rise must be solved by application of legal principle without the help of authority. The plaintiff contends that the jury, having found that the executors, having gone into possession after the death of the deceased, thereby became assignees, and that, notwithstanding the action of the Palatine Court and its receiver,

(1) 6 C. B., p. 744.

Appeal. 1911. MINFORD v CARSE. Holmes, L.J.

they are still to be regarded as assignees in possession and bound by the covenant in the lease to pay a year's rent in advance on every 1st November, Mr. Justice Boyd at the trial ruled in favour of the plaintiff on these points; for although the jury were unable to say whether during the continuance of possession the defendants could have made any profits out of the premises, he gave judgment for the full amount sued for.

In consequence of the jury having been unable to answer the question as to profits, the Divisional Court has ordered a new trial, from which order both sides have appealed, the plaintiff for the purpose of having the judgment in his favour restored, and the defendants for the purpose of having judgment entered for them.

It is sometimes said that hard cases make bad law, and I hope that this saying will not be applied to my judgment, for if the plaintiff is in the right, the executors' position is a very hard one. Although the plaintiff swore at the trial that he had better offers for the premises before the deceased took them in 1896, and that he could obtain £140 a year for them now if he had them, he refused to take the keys when offered to him in February last by the defendant Carse, acting, I presume, under the authority of the Court, nor do I see how the executors can derive any income or advantage from premises which can only be used as an adjunct to the business done at Moorefield, and which the receiver ceased to use because they were valueless as such adjunct.

If the defendants are now assignees, they must continue to be so, as, in consequence of a covenant against assignment in the lease, they cannot relieve themselves by a transfer to a pauper. They have, therefore, the unpleasant outlook of either paying £140 a year during the residue of the term or of defending an action like the present every year.

With the future, however, we have nothing to do. It is enough for us to consider the two defences relied on to the present claim. The first does not depend in any way on the decree of the Court or the action of the receiver. It turns on the period for which the rent is sought to be recovered.

The rent up to the 1st November, 1910, was paid long before this action, which claims a year's rent payable in advance on the

said 1st November. Now, whether we describe what the defendants are liable to pay as the actual value of the premises or as the profit they might, by the exercise of reasonable diligence, have derived therefrom, the amount can only be ascertained at the end of the period for which the rent is payable. How could any tribunal fix on the 1st November, 1910, what would be the actual value of the profits during the following year? Actual value in the sense in which it is used in the actions against executors who have gone into possession of leaseholds can only be ascertained for a period that is passed, not for a period that is to come. It varies from time to time. A farmer may, in one year, make a large profit from his lands, and in the following year a bad season or a fall in prices may reduce the income to a sum far below the outgoing. For this reason (even if there were no other) I would be prepared to hold that the plaintiffs had no cause of action either when the writ was issued or the action tried.

The other defence turns on the administration decree, the appointment of the receiver, and his taking over the premises. I am of opinion that the jury were right in holding that his action put an end to the right of the defendants to interfere in any way with the premises. I have always understood that a receiver appointed in a suit for the administration of the assets of a deceased man deprived the personal representative of the right to interfere therewith in any way; and if he were to interfere, without the authority of the Court, he would be at once restrained, but, if the interference were persisted in, would be punished for contempt. It seems to me to be unnecessary to discuss the question of possession. Even if the possession of the defendants technically continued, the premises ceased to have any actual value for them. The receiver had complete control; and no portion of the income derived from the management could have been obtained by the defendants. Thus, the premises, by the legal action of a Court of law, were rendered valueless to the executors. I have said that we have been referred to no case resembling the present. Mr. Ronan, with an emphasis and reiteration which suggest the absence of any other authority, has dwelt on two lines in the judgment of Lord Denman in *Hornidge* v. *Wilson* (1). The

(1) 11 Ad. & Ell. 641, at p. 645.

Appeal. 1911. MINFORD v. CARSE. Holmes, L.J.

facts therein bear no resemblance to those now before us. There the deceased lessee had underlet for an unexpired term the demised premises to an under-tenant who had become insolvent. His rent, if it had been paid, as it had been for a considerable time, would have enabled the personal representative to have paid the rent reserved by the lease; but although there was a condition of re-entry, and the defendant might have ejected the sub-tenant for non-payment of rent, and have substituted a better tenant, he did not do so. It also appeared that the defendant by allowing the premises to go out of repair had reduced their value. In these circumstances it seems to me clear that the personal representative had by his own default failed to realize the actual value of the premises. Lord Denman said in his judgment that the defendant, under the circumstances of this case, cannot take advantage of his own wrong by availing himself of a reduction of value occasioned solely by the want of repair in his own time. He adds: "As to the non-payment of any rent by the under-lessee, the plaintiff has nothing to do with this. The value of the premises as between him and the defendant is not affected by it." This is perfectly true; but how it bears on the question now before the Court I am unable to see. In the absence of authority, we may gain some help from considering what was the origin of the peculiar privilege which the law has given an executor who goes into possession of his testator's leaseholds. He is treated as assignee, and incurs the personal liability of an assignee in every respect but one, namely, the substitution for the reserved rent of the actual value of the premises. The obvious reason for this exceptional privilege is to enable the personal representatives of a deceased man to carry out the administration of his estate without exposing themselves to serious personal liability. It often happens that an executor must choose between leaving derelict a term of years belonging to his testator, and entering into possession of the premises so as to make something out of them. He would hesitate to take the latter course were it not for the rule of law that no rent could be recovered from him beyond the actual value that could be realized by a person in possession. But if, having gone into possession, he is prevented by a legal *vis major* from interfering in any way with the holding, the reason of the rule would apply still more

strongly. For these reasons I am of opinion that the action fails, and that the defendants are entitled to judgment. Where an estate is solvent the questions arising herein would be of little importance; but I gather from counsel on both sides that little or nothing can be realized therefrom, and I do not doubt that this accounts for the litigation.

CHERRY, L.J. :—

The great difficulty of this case is shown in the different views taken of it by the various Judges who have been called upon to express their opinion upon it. At its successive stages the Judge at the trial, on the answers of the jury to the first two questions submitted to them, gave judgment for the plaintiff for £140, the full amount claimed. Three Judges in the King's Bench Division unanimously set aside this judgment, and directed a new trial of the action. And this Court is now, by a majority of its members, about to set aside that order and enter judgment for the defendants. I am in the unpleasant position of not being able to agree with my colleagues. In my opinion, the order of the King's Bench Division is right, and ought to be affirmed; and my view of the case is exactly expressed in the clear and concise judgment of the Lord Chief Baron in the Court below.

The defendants are executors of a deceased lessee, and have been found by a jury to have entered into possession of his leasehold property. It is not disputed that there was evidence to go to the jury in support of this finding. The legal consequences of such entry are well settled by authority. The leasehold term becomes vested in the executors, as assignees. Privity of estate is established between them and the lessor. They become personally liable to the lessor for rent, and for any breaches of covenant that occur while they remain in legal possession; and they can only relieve themselves from this liability in the same way as an assignee by deed *inter vivos* can do, namely, by transferring their estate to some other person, and giving notice to the lessor under the 14th section of the Landlord and Tenant (Ireland) Act, 1860. Their liability as assignees continues as long as the estate remains vested in them, and if the landlord elects to treat them as such he can recover judgment against them *de bonis propriis*. If, on the other

Appeal. 1911. MINFORD v. CARSE. Cherry, L.J.

hand, the landlord so elects, he may treat them as executors, and recover judgment against them *de bonis testatoris*. There is a marked distinction between their position as executors and their position as assignees, which it is necessary carefully to bear in mind. As executors they are protected from liability where the assets are administered in Court, and they may also obtain the same benefit, without any administration decree, if they comply with the terms of Lord St. Leonards' Act (1); but as assignees, in their personal capacity, they remain liable to be sued for rent and for breaches of covenant, notwithstanding the decree for administration. This appears clearly from the judgment of Turner, V.-C., in *King* v. *Malcott* (2). In that case there was a claim by a lessor for the administration of the estate of his lessee, and he asked to have a sufficient amount out of the assets impounded to answer future possible breaches of covenant in the lease. The Vice-Chancellor refused the application, and in giving judgment said: "If the testator were a tenant of leasehold premises, and no rent were due from him, no debt is provable by the lessor under that decree in respect of any such rent. The Court, in the administration of the estate, deals with the legal rights of the parties, and the Court, in such a case, finds nothing in fact due at law to the lessor from the testator or his estate. *But suppose that rent afterwards becomes due*, and that proceedings are or may be taken by the landlord, what is then the course of the Court? *The proceedings must be against the executor*; and on the application of the executor the Court refers it to the Master to ascertain what is due to the lessor, and what provision should be made for the future in respect of the obligations arising from the lease; and a sum of money is commonly set apart to answer what may be required. *This course is taken not because of any right which the creditor has to come in under the decree, but in consequence of the right of the executor to an indemnity against legal liabilities out of the assets.*"

This judgment plainly recognizes that where the estate of a deceased lessee is being administered, the executor, if in possession, can, notwithstanding the administration decree, be personally sued for rent which becomes due after the date of

(1) 22 & 23 Vict., c. 35, s. 27. (2) 9 Hare, 692.

the order for administration; and that the only right of an executor against whom judgment for such rent has been obtained is to an indemnity out of the funds in Court. Any question as to an indemnity can only arise on the assumption that the executor is liable to be sued personally for the rent.

Similarly, North, J., in *In re Bowes* (1) says: "It is impossible to say that an action would be stayed against the executor merely because there is a suit to administer the estate of which he is executor, when the ground of the action really is not his liability as executor, but his personal liability."

In the recent case of *In re Nixon, Gray* v. *Bell* (2), it appeared in an administration suit that a number of leasehold properties had been formerly vested in the testator, but had been disposed of by him in his lifetime, and that none of them had consequently vested in his executors. Byrne, J., refused to make an order setting aside any sum to indemnify the executors against possible liabilities for rent or breaches of covenant, on the ground that such an order, according to the practice of the Court, was only made where there was privity of estate between the executors and the lessors. In giving judgment he said (3): "Then it is suggested (and I have not heard any good argument to the contrary) that the reason why, when there is privity of estate, something is set apart to protect the executors, is because the administration of the estate by the Court would not prevent an executor in possession of his testator's leaseholds from being sued as assignee under the lease. That does appear to be a ground for differentiating the one class of case from the other."

All these authorities appear to me to show that this action may be maintained against the defendants notwithstanding the order for the administration of the estate in the Court of the County Palatine of Lancashire, and that the proper course for the defendants to pursue is to apply for an indemnity from that Court against such claims. It may be a hardship upon them, but it is a hardship which many other executors have had to endure. We cannot alter the law merely because we find that in certain cases it presses heavily on individuals.

(1) 37 Ch. Div. at p. 138.
(2) [1904] 1 Ch. 638.
(3) [1904] 1 Ch. at p. 646.

Appeal. 1911. MINFORD v. CARSE. Cherry, L.J.

Then it is said that although the order for administration may not protect the defendants from liability, yet the appointment of the receiver has that effect, at all events, as regards any liability for rent which accrues due after the receiver has entered into possession of the leasehold premises. No authority was cited in support of this proposition, and I can find none. On the other hand, there are numerous authorities establishing that the appointment of a receiver and his entry into possession do not, and cannot, alter the rights of persons who are not parties to the suit as against those who are; and of course it could not for a moment be suggested that either his appointment or his entry into possession had the effect of divesting executors of the estate which had become vested in them by their own entry. A receiver is only an officer of the Court, who, by its order, acts as agent for all the parties to the suit, according to their respective interests; the Court taking care that such interests shall not be affected *inter se* by the appointment, and that the rights of third parties shall not be prejudiced. There is authority for that view as far back as the time of Lord Hardwicke. In the *Anonymous Case* (1) he is reported to have said that, "though a receiver is appointed by the Court, yet that will not alter the possession of the estate in the person who shall be found entitled at the time the receiver was appointed, so as to prevent the Statute of Limitations running on during the right in dispute." That statement of the law has been followed and acted on in numerous cases since, such as *Harrison* v. *Duigenan* (2); *Gresley* v. *Adderley* (3); *Thomas* v. *Brigstocke* (4); and *Groom* v. *Blake* (5). In *Sutton* v. *Rees* (6), Kindersley, V.-C., referring to the landlord's right to distrain after the appointment of a receiver over the tenant's estate, says: "The appointment of a receiver does not affect the rights of the landlord, but the Court will not allow him to exercise those rights without leave first obtained." Such leave, I take it, is only required where property under the control of the Court is to be interfered with, and is not necessary before commencing a personal action for rent, as in the present case.

(1) 2 Atk. 15.
(2) 2 Dr. & W. 295.
(3) 1 Swanst. 573.
(4) 4 Russ. 65.
(5) 6 Ir. C. L. R. 400.
(6) 9 Jur. (N. S.) 456.

Again, in *Commissioners of Church Temporalities* v. *Harrington* (1) Chatterton, V.-C., in giving judgment, says at p. 136: "Where a receiver is appointed by this Court over the estate of a defendant, the correlative rights of landlord and tenant, as subsisting previously between the defendant and his tenants, are not changed. The Court, by its officer, takes upon itself the possession previously existing in the defendant, and though it has additional powers of enforcing the landlord's rights, as formerly by attachment, and still by sequestration, the rights to be enforced remain unaltered. There is *a change only in the hand to receive* the tenants' rents from that of the landlord to that of the Court by its receiver."

But the strongest case of all is that referred to by Palles, C.B., in his judgment in the present case, namely, *Moir* v. *Blacker* (2) in this Court. There it was held that the appointment of a receiver over the tenant's interest by the Land Judge on a petition for sale, not only did not interfere with the possession, but did not even, on his being put into actual control of the premises, disturb the occupation of the tenant so as to prevent him from having a fair rent fixed. "The receiver," said FitzGibbon, L.J., "was regarded as merely managing for the tenant, who was the occupier *for every legal purpose*."

According to this decision, which has never been questioned, the defendants in this case remain in possession and occupation of the leasehold premises "for every legal purpose." How can it be contended that they are not liable on the covenant to pay rent?

But though the nature of the liability of an executor who enters into possession of the leaseholds of his testator is the same as that of an assignee, the measure of the liability is different. "Before entry and taking possession," says Smith, J., in *Rendall* v. *Andreae* (3), "the executor of a lessee cannot be made liable as assignee of the term, but if he does enter and take possession, he may be made liable as assignee; yet he may then, by proper pleading, limit his liability for the rent to the yearly value the premises might have yielded (4)." This judgment is

(1) 11 L. R. Ir. 127.
(2) 26 L. R. I. 375.
(3) 61 L. J. (Q. B.) 633.
(4) *Ibid.* at p. 633.

Appeal. 1911.

MINFORD v. CARSE.

Cherry, L.J.

founded upon the leading case of *Rubery* v. *Stevens* (1), where the measure of liability is stated to be "so much of the rent as the premises are worth." It is true that in other cases the extent of the liability is stated differently, and more favourably to the executor, as being the amount of the profits which he has made or by reasonable diligence might have made out of the premises, but I think that in the cases where such language is used, what is really meant is, that the profit which could be made is the best means of ascertaining the real value of the premises. Thus in *Hopwood* v. *Whaley* (2), which is strongly relied upon by the defendants here in support of their contention that the measure of liability is the amount which they could have made out of the premises, Maule, J., in giving judgment says: "I think, however, upon the authorities, as well as on principle, that where the rent reserved exceeds the value of the premises, an executor in the character of assignee is liable to the extent of such value (3)." *Hornidge* v. *Wilson* (4) also supports this view; and North, J., in a case strongly relied upon by the defendants here, *In re Bowes* (5), after citing all the cases I have mentioned, says "Now, these authorities clearly show what the liability of the executor would be in the present case. He is liable for the actual value of the premises during the time in which he held the premises as assign." In the last case reported that I am aware of, viz., *Whitehead* v. *Palmer* (6), Channell, J., says that having looked at numerous cases he had come to the conclusion "that an administrator is liable in respect of the period during which he is in possession for the same sum as a trespasser for the same period would be liable for as mesne profits, that is, for a proportionate part of what the premises might be worth if let by the year," and he accordingly held the defendant liable, in that case, for what he ascertained to be the yearly letting value of the premises, though he stated in his judgment that he was not prepared to find, as a fact, that the defendant could have obtained by reasonable diligence during the time in question more than he

(1) 4 B. & Ad. 241.
(2) 6 C. B. 744.
(3) *Ibid.*, p. 756.
(4) 11 Ad. & Ell. 645.
(5) 37 Ch. Div. at p. 134.
(6) [1908] 1 K. B. 151.

did obtain, which was a mere fraction of what he was held to be liable for. I agree with Palles, C.B., that the true measure of liability therefore is the value of the property, not the profits which were made, or could have been made, by the executor out of it.

The question is important in the present case, for, if this view be correct, it disposes of two arguments pressed upon us very forcibly by Mr. Wilson on behalf of the defendants—(1) That an executor in possession cannot be sued, as he is here, for rent payable in advance, inasmuch as it would be impossible to ascertain in advance the profits which he was likely to make, or ought to be able to make, out of the premises, though there would be little difficulty in ascertaining letting value; and (2) that, inasmuch as in the present case the receiver was in occupation for the whole of the period for which rent is sought to be recovered, the defendants could not possibly make any profits out of them. This last contention is, to my mind, completely answered not only by the fact that the measure of liability is, in my view, value, not profits, but also by the fact that the receiver is in law nothing more than an agent of the defendants to manage the place. The fact that he was in possession may be a good ground for the defendants to claim an indemnity from the Court which put him into possession; but it is, to my mind, no answer to the landlord's claim for rent.

Counsel for the plaintiff contends that, inasmuch as the onus of reducing their liability below the amount of the rent reserved lies upon the defendants, the plaintiff is entitled to judgment on the answers of the jury to the first two questions, though the jury were unable to answer the third and fourth questions left to them. I cannot agree with this view. The amount of the liability must be ascertained before there can be any judgment for the plaintiff; and that amount cannot be fixed until the value of the premises is ascertained.

I agree with the Chief Baron also that the question which ought to have been left to the jury was, as he states, "Were the premises of less value than £140 a year, and if so, how much less?" Inasmuch as that question was not left to the jury, and other questions to a similar effect were not answered, I think there

Appeal. 1911. MINFORD v. CARSE. Cherry, L.J.

ought to be a new trial of the action. But my view must, of course, yield to that of the other members of the Court, who are of opinion that the defendants were entitled to a direction at the trial, and that judgment ought now to be entered for them.

In conclusion, I desire only to say that I am strengthened in the view I have taken of the case by the fact that the defendants at the trial, though represented by able counsel, did not ask for a direction in their favour; and it is very seldom, in my experience, that counsel at a trial before a jury do not ask for at least as much as they are entitled to get.

Solicitor for the plaintiff: *William Alexander.*
Solicitors for the defendants: *Alexander Caruth & Son.*

W. G.

THE KING (BURKITT) *v.* JUSTICES OF FERMANAGH (1).

K. B. Div.
1912.
Jan. 19.

Road materials—Respective rights of county surveyor and contractor to take —Refusal of Justices to grant order to enter land—Subsequent application —Res judicata—*Grand Jury Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 162.

The provisions of sect. 162 of the Grand Jury Act, 1836, empowering a county surveyor and a contractor to take road materials out of lands, are to be construed *reddendo singula singulis*, and not as conferring concurrent rights on the county surveyor and contractor. Where there is a subsisting contract for the repair of a road, the county surveyor is not entitled to an order to enter the lands to take road materials save in exceptional circumstances, *e.g.*, where such contract has not been duly performed, or in case of sudden damage.

Rex (*Maher*) v. *Justices of Kilkenny* (5 New Ir. Jur. Rep. 113) applied and followed.

Per Gibson, J.: A refusal by Justices to grant an application by a road contractor for an order to enter land for the purpose of taking road materials, is not a bar to a subsequent application for such order by the contractor relying on fresh evidence or grounds.

CERTIORARI AND MANDAMUS.

By a contract in writing, dated the 14th July, 1911, and made between the County Council of Fermanagh and one Patrick Murray, the said Patrick Murray was appointed contractor for the repair of portion of the county road between Newtownbutler and Cavan for the period of three years from the 1st July, 1911, a proposal for the repair of which portion of the road had been passed by the County Council.

Patrick Murray applied to the Justices of county Fermanagh sitting at Newtownbutler Petty Sessions on the 17th October, 1911, for an order giving him liberty to enter the lands of one Thomas Beatty for the purpose of obtaining materials for the repair of the road in question. The application was refused by the Justices.

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and GIBSON, J.

K. B. Div. 1912.

THE KING (BURKITT) *v.* JUSTICES OF FERMANAGH.

On the 10th November, 1911, the prosecutor herein, the county surveyor of county Fermanagh, issued a summons seeking an order giving him liberty to enter the same lands for the purpose of obtaining materials for the repair of the same road. This summons came on for hearing before the Justices at Newtownbutler Petty Sesssions on the 21st November, 1911. The prosecutor attended and was prepared to tender evidence in support of his application, but Thomas Beatty's solicitor raised the point that the Justices could not hear the application, on the ground that the case had already been heard on the application of Patrick Murray, and that the matter was *res judicata*. It was contended on behalf of the prosecutor that his right to apply was distinct from the contractor's right, and further that an order of the kind could never act as a bar to a subsequent application even by the same party. The Justices ruled in favour of the contention on behalf of Beatty, and made an order as follows:—"Application refused on the ground of *res judicata*, *i.e.*, that this application has been already heard and refused by the Justices at a previous Petty Sessions Court on the 17th October, 1911."

The prosecutor, by leave of the Court, applied on notice for a writ of *certiorari* to quash this order on the ground, in substance, that the principle of *res judicata* did not apply, and that the Justices should have permitted the prosecutor to enter upon his application and tender evidence in support of it; and for a writ of mandamus directed to the Justices to enter continuances and to proceed to re-hear and to hear and determine the complaint according to law.

In an affidavit made by the prosecutor in support of the motion it was stated that if the order was allowed to stand, "it will seriously affect my ability as county surveyor to see that the county roads are kept in a proper state of repair. It sometimes happens that a contractor who wishes to get out of his contract brings forward an application for liberty to enter a quarry, and does not press his application; and when an order has been made refusing his application, he uses this as a reason why the County Council should let him out of his contract, as he is unable to obtain materials. It also frequently happens that a contractor having failed in his contract, the county surveyor has to

take over the repair of the road himself, and great inconvenience would be caused if he is bound by the order previously made against the contractor."

Thomas Beatty, in an affidavit made by him and filed on behalf of the Justices, stated that on the hearing before the Justices of Patrick Murray's application, the case was thoroughly discussed, and all the evidence brought before the magistrates, and they came to the conclusion that the road materials could more conveniently be procured elsewhere, and refused the application. That when the application of the prosecutor came on for hearing at the Newtownbutler Petty Sessions, his solicitor was asked by the magistrates was there any change of circumstances since they had decided the matter, and he said not, with the exception that the county surveyor was now the complainant instead of the contractor. The affidavit further stated that on the former occasion the application was most strenuously fought by Patrick Murray; that he was still the contractor, and the contract had not been taken over by the county surveyor; and that Murray had stones laid on the road which he had procured elsewhere.

Harrison, K.C. (with him *Pringle*), for the prosecutor :—

The principle of *res judicata* does not apply to applications such as these, where the state of facts must alter from time to time. At all events, the principle cannot apply in the present case, where the respective applications were by different persons. This is not a case like *Rex* (*Farrell*) v. *Justices of Queen's County* (1), where the applications were in respect of the same road, the same quarry, and made by the same person. Here, no doubt, the road is the same, and the quarry the same, but the applicants are different. The county surveyor has a right, notwithstanding that the application was refused, to come before the magistrates, and see that the case is properly presented to them. By section 162 of the Grand Jury Act, 1836, as adapted by the Local Government (Adaptation of Irish Enactments) Order, 1899, the county surveyor, as well as the contractor, is entitled to an order

(1) 5 New Ir. Jur. Rep. 113.

K. B. Div. 1912. THE KING (BURKITT) v. JUSTICES OF FERMANAGH.

under the section. It is important that the county surveyor, as the officer of the County Council, should have this right, since, if the roads are not kept in repair, the County Council are liable to indictment or proceedings for a mandamus. I admit that the county surveyor and the contractor would not, both at the same time, be entitled to orders under the section. I submit, however, that the county surveyor has the paramount right. In a case like the present he would hold any road materials obtained as trustee for the contractor. Reliance may be placed on *Rex* (*Maher*) v. *Justices of Kilkenny* (1) as showing that the county surveyor is not the proper party to apply in this case. That, however, was a decision under the provisions authorizing the employment of direct labour, and does not apply to a case like the present where the county surveyor claims to exercise the rights originally given by section 162 of the Grand Jury Act. Moreover, the order there was clearly bad, inasmuch as it empowered, not the county surveyor, but the County Council through their surveyor, to enter the lands.

Calvert, for the Justices:—

No doubt, section 162 of the Grand Jury Act mentions both the county surveyor and the contractor as persons who may apply for an order under the section; but the right of the county surveyor can only exist where the works for which the materials are required are to be executed by him, and not by the contractor; for example, where there is no contract for the work (section 15); or where the contractor has neglected to keep the road in repair (section 54); or in case of sudden damage (section 33). [He also referred to the Local Government (Procedure of Councils) Order, 1899, Articles 8, 25 (5).]

Pringle in reply referred to the Local Government (Ireland) Act, 1898, sect. 82, sub-sect. 1.

LORD O'BRIEN, L.C.J.:—

We have listened to the arguments very carefully. I am of opinion that the case is governed by the decision in *Rex* (*Maher*) v. *Justices of Kilkenny* (1). There the judgment of the Court, consisting

(1) 5 New Ir. Jur. Rep. 113.

of Palles, C.B., and Johnson and Gibson, JJ., was delivered by Palles, C.B., and he lays down in so many words that in a case like this the county surveyor is not entitled by virtue of his office to ask for an order of the description sought here. That is a categorical decision that the county surveyor, except in special circumstances which do not exist in the present case, has no *locus standi* to apply for such order, and on this ground, and this ground alone, I am of opinion that this application should be refused.

PALLES, C.B. :—

I am of opinion that the present applicant, the county surveyor, has not any *locus standi* to make the present application. There is a subsisting contract for the repair of the road. There is no allegation that there has been any breach of that contract; or that any circumstances have arisen which would justify the county surveyor (notwithstanding the contract) in himself performing the work for the county council. Section 162 of the Grand Jury Act of 1836, by which power is given *both* to the county surveyor and to the contractor to take road materials, must be construed *reddendo singula singulis*. It is a power conferred on these persons to facilitate them in carrying out their duties under the Act of Parliament, or under the contract entered into under that Act, and in order to see whether the county surveyor is authorized to apply for an order to enter on these lands and take road materials from them, we are bound to see whether a state of facts has arisen by virtue of which an obligation has been thrown upon him to lay those road materials on the road. The various sections already referred to by Mr. Calvert show that under the Grand Jury Act an obligation may be so thrown upon the county surveyor, where there is no subsisting contract, and where, although there is such a contract, it has not been duly performed, and also in case of sudden damage; but none of these states of facts exists here.

I say nothing as to any of the other questions which have been argued.

K. B. Div. 1912.

THE KING (BURKITT) *v.* JUSTICES OF FERMANAGH.

GIBSON, J.:—

I agree. Mr. Harrison admits that the county surveyor and the contractor cannot at the same time exercise rights under the section. It must be applied *reddendo singula singulis*, and not as conferring concurrent rights of entry. In the present case the contractor is bound to repair the road under a subsisting contract which, while in force, excludes the right of the county surveyor to apply for an order, save under exceptional circumstances which do not here exist. Mr. Harrison further admits that if the county surveyor got the order sought for, he could not exercise it for his own purposes, but would be a trustee for the contractor, and would be bound to hand over the road materials to him. This is in my opinion another ground for refusing the application; it is not made with the *bona fide* object of enabling the county surveyor to carry out purposes of his own, but to evade renewing an application already refused to the contractor. I do not know why the contractor did not himself make a fresh application, as a refusal could not, if fresh evidence or grounds were relied on, bar the applicant. Instead of that, the expedient is adopted of putting forward the surveyor as if an independent "*actor*." The present application was not for the benefit of the county surveyor, but of another person who is not now before the Court. On these grounds I think that the application should be refused.

Solicitors for the prosecutor: *Falls & Pringle.*

Solicitor for the Justices of Co. Fermanagh: *Michael E. Knight.*

J. G. T.

SWIFTE *v.* ATTORNEY-GENERAL.

H. L.
1912.
Jan. 16.

Mixed marriage—Penal laws—Extra-territorial operation of statute—
19 *Geo.* 2, *c.* 13 (*Ir.*).

APPEAL by the petitioner from the judgment of the Court of Appeal, reported [1910] 2 I. R. 140.

A. W. Samuels, K.C., and *F. H. M. Corbet* (of the English Bar) (with them *A. M. Bulloch*, of the English Bar), for the appellant.

Denis S. Henry, K.C., and *E. G. M. Swifte*, for the respondent, G. B. M. Swifte, were not called on.

The House of Lords (EARL LOREBURN, C., EARL OF HALSBURY, LORD ATKINSON, and VISCOUNT HALDANE) affirmed the judgment of the Court of Appeal, and dismissed the appeal with costs (1).

Solicitors for the appellant: *Arthur H. Dobbs & Son*, for *A. & L. Goodbody*.

Solicitors for the respondent, G. B. M. Swifte: *Powell & Burt*, for *H. T. Dix & Son*.

(1) [1912] A. C. 276.

Appeal.
1912.

April 24, 25.
May 2.

COFFEE *v.* McEVOY AND ANOTHER (1).

(1910. No. 10118.)

Negligence—Injuries sustained by infant trespasser—Landlord and tenant—Overholding—Demand of possession—Execution of warrant—Relation back—14 & 15 Vict. c. 92, sect. 15—Limit of liability of owners to infant trespasser on their premises.

In an action to recover damages for personal injuries sustained through the negligence of the defendants, evidence was given that the plaintiff (who was a child of six years of age) resided with his parents in two rooms on the first floor of a tenement house; the parents had held these rooms on a weekly tenancy from the defendants: the stairs and landings were kept by the defendants under their own control. On the 8th of August, 1910, the defendant served a notice to quit upon the parents; this notice expired on the 15th; on the 16th demand of possession was made; on the 17th a summons under the Summary Jurisdiction (Ireland) Act, 1851, was issued to recover possession of the premises; on the 22nd the infant plaintiff fell through an open window, from which the lower sash had been removed, on the same landing as the rooms, to the yard below, a distance of some 24 feet, and was severely injured; on the 25th an order for possession was obtained from the magistrate. The following questions were left to the jury:—

Was the window at the time unsafe for children resident in the house? Answer—"Yes."

Was the plaintiff a child resident in the house at the time of the occurrence? Answer—"Yes."

Did the defendants know that the landing would be used, and the window approached, by children resident in the house? Answer—"Yes."

Did the defendants take reasonable precautions to prevent the window from being dangerous to young children resident in the house? Answer—"No."

If you answer "No," then state what reasonable precautions they omitted. Answer—"Reasonable guard."

Could the defendants have reasonably anticipated that the window might be taken from its sash, leaving an unprotected opening? Answer—"Yes."

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

Held, affirming the judgment of the King's Bench Division, that the plaintiff was a trespasser, and that, notwithstanding the findings of the jury, the defendants were entitled to have a verdict and judgment entered for them.

Semble, the removal of the sash by the defendants for the purpose of repair would not have made them liable for the accident.

Cooke v. *Midland Great Western Railway of Ireland* ([1909] A. C. 229) distinguished.

The liability of house-owners towards infant trespassers on their premises considered.

APPEAL by the plaintiff from the judgment of the King's Bench Division, *ante*, p. 95, directing the verdict in the action and judgment to be entered for the defendants.

Hanna, K.C. (with him *James O'Connor, K.C.*, and *Louis Kelly*), for the plaintiff :—

We say that the real principle which governs the liability of the defendants to a child in the position of the plaintiff is defined by Lord Macnaghten in his judgment in *Cooke* v. *Midland Great Western Railway of Ireland* (1), where he says, at p. 234 :—"The question for the consideration of the jury may, I think, be stated thus : Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to some children resorting to the place, and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred ?"

Cooke's Case (1) was considered in *Jenkins* v. *Great Western Railway* (2) by the Court of Appeal in England, but it is submitted that that Court put too narrow a construction on it. [HOLMES, L.J. : In *Jenkins' Case* Fletcher Moulton, L.J., says, at p. 534 :—"The ground of the decision in *Cooke's Case* (1) was that there was leave and licence to play with the turntable, and that it was because the person availed himself of that leave and licence

(1) [1909] A. C. 229. (2) [1912] 1 K. B. 525.

Appeal. 1912. COFFEE v. McEVOY.

to play with the turntable that the injury occurred." *Henry, K.C.*, referred to *Schofield* v. *Mayor, &c., of Bolton* (1).] Lord Macnaghten further says, at p. 236 :—" Persons may not think it worth their while to take care of their own property, and may not be compellable to do so; but it does not seem unreasonable to hold that if they allow their property to be open to all comers, infants as well as children of maturer age, and place upon it a machine attractive to children and dangerous as a plaything, they may be responsible in damages to those who resort to it with their tacit permission." There can be no doubt, from Lord Atkinson's judgment, that his Lordship dealt with the case on the assumption that the infant plaintiff was a trespasser. He held the company in such a case would be responsible " even though the injured person be a trespasser on the machine at the moment the accident occurred." Lord Collins is the only one of the learned Lords present who used the word " invitation." Again, Lord Robson's judgment in *Grand Trunk Railway of Canada* v. *Barnett* (2) agrees with our proposition. At p. 369 he says :—" The railway company was undoubtedly under a duty to the plaintiff not wilfully to injure him; they were not entitled unnecessarily and knowingly to increase the normal risk by deliberately placing unexpected dangers in his way." To the same effect are the judgments of the House of Lords in *Lowery* v. *Walker* (3), reversing the orders of the Court of Appeal and of the King's Bench Division. In *Miller* v. *Hancock* (4), where a house was let out in flats, the Court of Appeal (Lord Esher, M.R., and Bowen and Kay, L.JJ.) held that there was an implied obligation on the part of the landlord to the tenants to keep the common staircase in proper repair, so that they might have safe access to their premises, and that this obligation extended to tradesmen or others having business with them. In *Schofield* v. *Mayor of Bolton, &c.* (1), Lord Justice Vaughan-Williams says the very test of liability in these cases is in the passage I have quoted from Lord Macnaghten in *Cooke's Case* (5). The whole law as regards liability towards children is summarized

(1) 26 Times L. R. 230.
(2) [1911] A. C. 361.
(3) [1911] A. C. 10.
(4) [1893] 2 Q. B. 177.
(5) [1909] A. C. 229.

in *Lynch* v. *Nurdin* (1). It is also put very clearly by Lord Atkinson in *Cooke's Case* (2). To a child a thing may be a trap which to an adult would be an obvious danger to be shunned. A window is an attraction to a child.

But if the Court should hold that the questions ultimately left by Mr. Justice Dodd to the jury, and their answers to them, did not sufficiently try the case, instead of entering a verdict and judgment for the defendants, the Divisional Court should have directed a new trial, for in that view of the case the question whether the defendants' employees were the persons who removed the sash has never been determined.

Henry, K.C., and *Jefferson, K.C.* (with them, *J. H. S. Russell*), for the defendants :—

The case has been argued here on different lines from those on which the plaintiff's counsel proceeded in the Court below. The statement of claim alleges that at the time of the accident the plaintiff was "lawfully" using the staircase, while the statement of defence alleges that he was then a trespasser; and it is now not controverted that he was a trespasser: *Jones* v. *Foley* (3) is conclusive as to that. The second set of questions left to the jury proceed on the basis that the plaintiff was lawfully there. There was no evidence that anyone took out the sash, with the authority of the M'Evoys. [Counsel examined the evidence very fully.] But if it had been removed by persons in their employment, that would not entitle the plaintiff to succeed, if the removal was for the purpose of, and in due course of, effecting necessary repairs. To create liability towards a trespasser something more must exist than putting and keeping the place in repair and the reasonable user of premises by their owner. *Jones* v. *Foley* (3) is a clear authority to this effect. In *Grand Trunk Railway of Canada* v. *Barnett* (4) the only defect in the plaintiff's case was that he was a trespasser. Lord Robson accepts the authority of *Murley* v. *Grove* (5).

In *Cooke's Case* (6), which was so much relied on by the plaintiff's counsel, the judgment of the House of Lords proceeded on the grounds that the plaintiff in that case was on the turntable

(1) 1 Q. B. 29.
(2) [1909] A. C. at p. 238.
(3) [1891] 1 Q. B. 730.
(4) [1911] A. C. 361.
(5) 46 J. P. 360.
(6) [1909] A. C. 229.

Appeal. 1912.

COFFEE v. McEVOY.

by the leave and licence, if not by the invitation, of the defendants. Such also was the case with the plaintiff in *Lowery* v. *Walker* (1).

This view of *Cooke's Case* (2) was taken by the learned Judges who decided *Schofield* v. *Mayor, &c., of Bolton* (3) and *Jenkins* v. *Great Western Railway of England* (4).

As to a new trial, the plaintiff's counsel acquiesced in the substitution of the second set of questions for those originally submitted. This alteration was made in the interests of the plaintiff, and was objected to strenuously by the defendants' counsel. The plaintiff must be bound by the course of the trial in which his counsel acquiesced.

Louis Kelly, in reply:—

This was not a case in which the defendants were entitled to have judgment entered for them. The duty of the Divisional Court is to "decide the law of a case, and also to correct anything that has been done amiss by reason of the perversity of the jury, or if they think that there has been a miscarriage of justice"; it is not their function to find facts, especially when those would be inconsistent with actual findings of the jury; *per* Lord Loreburn, C., in *O'Reilly* v. *McCall* (5). There was admittedly evidence upon which the jury might have found for the plaintiff on No. 2 of the original questions, and if this be a material issue it has never been tried. The plaintiff's tender age must be taken into consideration. An open staircase window presented a temptation and a danger to him which it would not have had for an adult. As Lord Atkinson observed in *Cooke's Case* (6), the principle of the liability of the owner of premises with hidden dangers is measured to a great extent by the infirmity of the party injured. "To the blind the most obvious danger may be a trap. To the idiotic the most perilous act may appear safe and cautious." As to the duty of owners of flats with respect to a common staircase, see *Miller* v. *Hancock* (7) and *Huggett* v. *Miers* (8), where the subject was further discussed, and *Miller* v. *Hancock* (7) was distinguished on the facts.

(1) [1911] A. C. 10.
(2) [1909] A. C. 229.
(3) Times L. R. 230.
(4) [1912] 1 K. B. 525.
(5) [1910] 2 I. R. 42, at p. 70.
(6) [1909] A. C. at p. 238.
(7) [1893] 2 Q. B. 177.
(8) [1908] 2 K. B. 278.

Appeal.
1912.
COFFEE
v.
McEVOY.
May 2.

THE LORD CHANCELLOR :—

This action was expressly framed on the basis that the plaintiff was lawfully using the staircase in No. 46 Queen Street, Dublin, on the occasion of the deplorable accident, which is the subject of the plaintiff's claim. The negligence imputed to the defendants leading to the accident which befell the plaintiff was definitely stated to be that the defendants, having the control and possession of the staircase, allowed it to be out of repair, unprotected, and dangerous to persons lawfully using it. No other negligence was suggested, and no wilful or intentional act or misconduct was relied on as against the defendants. It is a strange fact that the landing window was never mentioned in the plaintiff's pleadings, and that no allusion whatever was made to the plaintiff's fall from that window on to the public street, nor to the circumstances under which it took place. Although the child was seen by certain witnesses, who were examined, when falling from the window to the street, no witness was examined to give any account of how, or under what conditions, the accident occurred. No one knows, so far as the case has gone, how the child got through, or fell through, the window, and the whole matter is left in obscurity, and is matter of the merest speculation. Contrary to the averment in the statement of claim, it is certain the child did not use the staircase on the occasion ; and, while there is nothing to show that he had any intention of using the staircase, yet it was made the very foundation of the plaintiff's case as formally presented, that the injuries were sustained by the plaintiff when lawfully using the stairs. Further, it is now admitted that the child, with the rest of the Coffee family, was a mere trespasser on the defendants' property, on August 22nd, the date of the occurrence. Indeed, the family as a whole were, as pointed out by the Lord Chief Justice, persistent trespassers, who were holding the premises against the will of the defendants, and defying to the last the legal proceedings which the defendants were compelled to take to forcibly remove them from the house. The unfortunate child, the plaintiff, must also be ranked in the same category of being a trespasser, although, of course, from his age no sort of hard responsibility can rest on him. The case so presented on the

Appeal. 1912.

COFFEE *v.* McEVOY.

The Lord Chancellor.

pleadings was obviously made at the trial, and on the conclusion of the plaintiff's evidence the learned Judge who tried the case was called on by the counsel for the defendants to direct a verdict for the defendants on the various grounds stated in the report. Amongst other matters the learned counsel relied on the fact that the plaintiff was a trespasser, from which it would appear that the whole foundation of the plaintiff's case as presented up to that point had failed. I agree with the Lord Chief Baron's view, that it would have been well if the learned Judge had yielded to the requisition of defendants' counsel, and at any rate that the plaintiff's counsel should have been directed to state specifically and definitely on what further ground they could proceed with the case. That course, however, was not taken, and after evidence given on behalf of the defendants, the learned Judge put several questions to the jury, according to the basis of the plaintiff's complaint. The main controversy on the evidence was whether or not the lower sash of the window was removed by employees of the defendants. Questions 2, 3, and 4 dealt with the plaintiff's contention that the sash was removed by men in the defendants' employment, and that the window was thereby rendered unsafe, that their action in so doing was negligent, and that the defendants knew, or by the exercise of reasonable care and diligence ought to have known, that the window was unsafe for children resident in the house. There was nothing in the questions to indicate the status of the child at the time as being a trespasser on the premises, and indeed from the report of the learned Judge it does not appear that the attention of the jury was called to that important feature of the case.

The jury failed to answer the three questions I have mentioned, whereupon, as the result of a discussion, and with the assent, if not indeed at the instance, of the learned counsel for the plaintiff, and admittedly against the strenuous protest of the counsel for the defendants, the learned Judge substituted, for those unanswered, three other questions which appear to me to be in no way consistent with the course of the trial and the case presented by the plaintiff. The jury were asked whether the defendants had taken reasonable precautions to prevent the window from being dangerous to young children resident in the house; secondly, what reasonable

precautions the defendants omitted; and thirdly, whether the defendants could have reasonably anticipated that the window might be taken from its sash, leaving an unprotected opening. No such case as that was up to that point put forward by the plaintiff, either in pleading or otherwise. The jury answered the last-mentioned question in the affirmative, the first question in the negative, and the second question by stating that there should have been a reasonable guard. Three other questions being on the original list of questions were also answered to the effect that the window was unsafe for children resident in the house, that the plaintiff was a child resident in the house at the time of the occurrence, and that the defendants knew that the landing would be used and the window approached by children resident in the house. It was on these findings the learned Judge entered judgment for the plaintiff for £50, the amount of damages awarded by the jury.

The first question for our consideration is whether or not, in the circumstances of the case, that judgment should be allowed to stand. There is no finding that the defendants were in any degree responsible for the removal of the lower sash of the landing window from which the child fell on to the street. Examining the evidence I see nothing to indicate that, while the window was *in situ*, any possible danger existed for a child like the plaintiff, aged six years. There were no weights on which the lower sash could be lifted, and it was out of the question that the child could lift it himself, or support it when lifted. Whether therefore the child approached the window or not, there was nothing so far to justify the imputation of negligence on the part of the defendants. Had the window remained as it was before the lower sash was removed, no such accident as took place could possibly have occurred. There were, no doubt, two broken panes, but the child could not have got through them; and the certain fact is, that the child fell from the window at a time when the lower sash had been removed. There is not a particle of evidence to sustain the finding that the defendants could have reasonably anticipated the removal by some one in the house of the lower sash, leaving thereby an unprotected opening—that is the meaning of the question found in the affirmative by the jury. There was no hint

Appeal. 1912. COFFEE v. McEVOY. The Lord Chancellor.

on the part of the plaintiff's counsel that they relied on any such case against the defendants, and the first heard of the matter was when the question I have mentioned was submitted to the jury. There is no suggestion in the jury's answer that the sash was removed by the defendants, or by anyone on their part; indeed, quite the contrary; and I cannot but take it as based on the evidence given by Mrs. Sullivan, to the effect that Mrs. Coffee herself had removed the sash, whether for the purpose of admitting fresh air, or some other reason not easy to conjecture. The jury, it will be remembered, had failed to find that it was the defendants' men had removed the sash, and there was no evidence that anyone else in the house, save Mrs. Coffee, had ever removed it. She was the mother and guardian of the young plaintiff, and I cannot find a word of evidence to justify the finding that the defendants had anything in the world to suggest to them that she or any other person in the house would take that course, and thereby produce the condition of things which was the ground of the action. Mrs. Coffee at the time was a plain and voluntary trespasser on the premises, in the full sense of the term; and if she was the person pointed at, as I believe she was, in the implication of the answer that some such person did remove the lower sash, that being the act of a trespasser, and by the very mother and guardian of the plaintiff, also a trespasser, there is nothing to support the notion that the defendants did or ought to have anticipated what occurred, and in the circumstances there would be no legal justification for holding the defendants responsible for the result. It would be an amazing state of the law if the owner of premises was held answerable for injury received by a trespasser on his property—the direct result, as it would be in such a case, of the unwarrantable act of the child's own mother, a wilful trespasser herself. *McDowall* v. *Great Western Railway Co.* (1) is a direct authority on the matter, if authority were required; and, further, the observations of the three Lords Justices who decided it, namely, Vaughan Williams, Romer, and Stirling, L.JJ., dwelling upon the impossibility of holding that the Company could have anticipated the action of the trespasser in that case, are, I think,

(1) [1903] 2 K. B. 331.

distinctly applicable to the evidence in this case. There is no evidence that any other persons than Mrs. Coffee, within the house, ever removed the sash, and certainly nothing to bring any knowledge to the defendants of any likelihood that they would do so. I must not pass from this subject without recalling that Mrs. Coffee denied having removed the sash, notwithstanding the deliberate, definite evidence of the witness, Mrs. Sullivan, whose credibility in the matter, so far as the report is concerned, was not for a moment challenged. Indeed, I have already conveyed my own opinion that the jury must have accepted the evidence implicating Mrs. Coffee.

In that state of affairs it would be impossible for the Court to uphold the judgment entered for the plaintiff. The other matters found by the jury raise no liability against the defendants—for it was by reason of the removal of the sash that the incident occurred on which the action is founded. I can put no other construction on the finding I have dealt with than that I have stated. If it has to be taken as referring to other persons in the house, the verdict could not stand, for no evidence was forthcoming to show that any other inhabitant of the house had ever removed the sash in the landing window, and there was nothing to raise any apprehension on that point in the minds of the defendants. Later on I shall express my opinion regarding the legal position in such a case, even if the question had that meaning, rather than that which I believe I have rightly placed upon it. The judgment, therefore, as the result of the trial, ought, in my opinion, to be entered for the defendants.

But then we arrive at the consideration of an application made in Court by the plaintiff's counsel, who ask us to order a new trial, in order that the specific question may be tried, whether or not there is any foundation for the allegation that it was two employees of the defendants who removed the sash, and did so negligently. Even if I did not take the view of the law on the subject which I do, I do not think it would be possible for the Court to sustain that application. I have come to the conclusion that the plaintiff is bound by the course taken at the trial, and must stand or fall with the verdict and judgment actually entered at it.

Mr. Kelly, junior counsel for the plaintiff, in the course of his

Appeal. 1912.

COFFEE v. McEVOY.

The Lord Chancellor.

effective argument in this appeal, called our attention to the decision of the House of Lords in *O'Reilly* v. *M'Call,* which is set out in our Irish Reports, [1910] 2 I.R., p. 70. He relies on that decision as an authority on which this Court should act in directing a new trial of the action—that the point of that judgment is to be found in the sentence in the Lord Chancellor's judgment where he said that it was the duty of the Court to decide the law of a case, and also to correct anything that has been done amiss by reason of the perversity of the jury, or if they think that there has been a miscarriage of justice. The plaintiff here has no ground for complaining of the action of the jury, and though they failed to agree on the question on which the plaintiff contested the case at the trial, namely, whether it was the defendants' employees removed the sash, there is nothing whatever to vitiate their action so far as the plaintiff is concerned. Then is there a miscarriage of justice? I do not think there is any ground whatever for such a view. First of all, I have, as I said already, come to the conclusion that the plaintiff's counsel assented to what may be described as a transformation, at the last moment, of the case as it had been previously presented ; that being so, they have no right to call for a new trial in order to present the case on a different basis. There is the additional objection that the plaintiff's counsel has now to admit that the plaintiff was a trespasser and not a lawful resident in the house at the time of the accident, and by that inevitable admission the foundation of the plaintiff's case, as made, is gone. I shall not dwell on the nature of the evidence that it was two employees of the defendants who removed the sash. I refrain from doing so lest perchance there ever should be a re-trial of the case. Were that the only question in the case, I should be personally unable to say that I think there was no evidence on the subject fit to be submitted to a jury, and that fact at once brings me to the consideration of the legal question involved. Assuming that it was ever found by a jury that it was the defendants' employees who removed the sash, on what ground could liability be brought home to the defendants on the facts of this case? *Cooke* v. *The Midland Railway Co.* (1) was much relied on by the plaintiff

(1) [1909] A. C. 229.

in this respect, but, on examination of the judgment of the learned Lords in that case, I think it is impossible to regard it as an authority in the present instance, where the plaintiff was a trespasser on the defendants' property. There was not one of the learned Lords who did not, in that case, dwell on the fact that the child was on the company's premises, at least with its permission, if, indeed, he was not in the position of a child tempted to enter upon the company's lands, to play with the turn-table, on which he received the injuries for which the action was brought. The judgment of the Court of Appeal in England in the recent case of *Jenkins* v. *The Great Western Railway* (1) is an express authority on the view I have indicated of the House of Lords' judgment in *Cooke's Case* (2), and in this appeal we think it right to follow that decision, which indeed corresponds with our own opinion. The case of *Jones* v. *Foley* (3) has an important bearing on the question of the liability of an owner of property for injury to a trespasser upon it. The circumstances of that case were, in respect of the law involved, in all substance the same as in the present case, and the plaintiff, who complained of damage to his furniture incurred by the defendants' action in having the roof removed, had been a tenant of the house, but was at the time wrongfully holding possession after the expiration of the tenancy. The owner was exonerated from all liability on the ground that he did not purposely damage the goods, and that the removal of the roof was effected, not with the object of injuring the plaintiff, but simply as a step in the demolition of his own house. That being so, the Court regarded the occurrence as nothing but the unfortunate result of a transaction in which the defendant was lawfully engaged. Here, if the defendants were, in fact, responsible through their men for removing the window-sash, no other purpose could be, or ever was, attributed to them, than the lawful purpose of repairing the window, and replacing with fresh glass the broken panes. In principle, *Jones* v. *Foley* (3) would, in such circumstances, be, in my opinion, applicable in the present case, and there is no authority carrying the law further in favour of a trespasser injured under the like conditions. The plaintiff's

(1) [1912] 1 K. B. 525.
(2) [1909] A. C. 229.
(3) [1891] 1 K. B. 730.

Appeal. 1912. COFFEE v. McEVOY. The Lord Chancellor.

parents had the fullest notice that the lower sash in the landing window had been removed, even if Mrs. Coffee was, in no way, responsible for the fact, and the law would expect, and the defendants would have the right to expect, that the parents by whom the children were being wrongfully detained as trespassers on the premises would take the ordinary care of preventing their infant children running any risk from making any use of the landing window. I am fully aware that the law cannot be regarded as settled in a full sense on the question of the owner's liability for injuries received by mere trespassers upon his property. The subject was expressly reserved by the learned Lords who made the decision in *Lowery* v. *Walker* (1). Lord Atkinson, in his judgment in *Cooke's Case* (2), on p. 239, also reserved the question in relation to trespassers, in particular circumstances stated by him in the passage to which I refer. In the case of *The Grand Trunk Railway of Canada* v. *Barnett* (3), Lord Robson, delivering the judgment of the Privy Council, on p. 639, dealing with the plaintiff on the footing that he was a trespasser, discussed the question of what his rights were in the circumstances against the appellant company. In the course of the passage in his judgment he says :—"The railway company was undoubtedly under a duty to the plaintiff not wilfully to injure him; they were not entitled unnecessarily and knowingly to increase the normal risk by placing unexpected dangers in his way. . . ." Also, he added on p. 370 :—"Again, if he be a trespasser, a question may arise as to whether or not the injury was due to some wilful act of the owner of the land involving something worse than the absence of reasonable care." After mentioning *Lowery* v. *Walker* (1) he said—"In cases of that character there is a wilful, reckless disregard of ordinary humanity rather than mere absence of reasonable care." These views of the learned Lord recall the striking judgment of Chief Justice Best in the well-known case of *Bird* v. *Holbrook* (4), in which the plaintiff, although a trespaser, was held entitled to recover damages for injuries caused by a spring-gun, placed upon his lands by the owner, without any notice to

(1) [1911] A. C. 10.
(2) [1909] A. C. 229.
(3) [1911] A. C. 361.
(4) 4 Bing. 628.

persons who might trespass, and with the wilful purpose of injuring trespassers. The learned Judges in the Divisional Court, the Lord Chief Justice, the Lord Chief Baron, and Mr. Justice Gibson, made an exposition of the law in all substance to the same effect. I have not dealt with the subject further than in relation to the facts in the present case, between which and those found in other cases quoted in the argument no analogy appears to me to exist. While admitting fully the different results that may follow from the application of the same principles in the cases of children as compared with adults, I agree with the view of the Divisional Court that no evidence was given at the trial on which the defendants could be held responsible for the plaintiff's injuries upon any test or standard of liability recognized in the existing law. Accordingly, I do not think a new trial should be granted, and the judgment entered for the defendants should be affirmed with costs.

HOLMES, L.J.:—

Mr. Hanna, in opening the appellant's case, referred at some length to *Cooke* v. *The Midland G. W. Railway Co. of Ireland* (1), and relied on that decision as the chief support of his argument. I desire to begin my observations by expressing my opinion that this authority throws no light on, and gives no assistance in, the present case. It is only necessary to read the judgments in *Cooke's Case* (1) to see that they rested on the proposition that the plaintiff was not a trespasser on the place where the accident occurred, that he was there with the permission, or even on the invitation, of the defendants, and that what was considered in the judgments was the nature and extent of the obligation of the Company to a person holding such a position. Here there is no doubt that at the time of the accident, the plaintiff was a trespasser in the defendants' house. His mother had been weekly tenant of two rooms therein, with the right to go to and from them by the hall and stairs. But this tenancy had been ended by notice to quit on the 15th August, possession was demanded on the

(1) [1909] A. C. 229.

Appeal. 1912. COFFEE v. McEVOY. Holmes, L.J.

following day; on the 17th a summons to recover possession was served; and on the 25th a decree for possession was obtained. The accident occurred on the 22nd, on which day the plaintiff and his mother were not only trespassers, but trespassers whom the owner was taking the most expeditious legal means of removing from the premises. There is therefore no resemblance between the two cases.

The plaintiff met with the accident by falling through an open window that lighted a narrow lobby by which access was obtained from the staircase to the door that opened into the rooms of which Mrs. Coffee had been tenant. This window had a sash across the middle of it, dividing it into an upper and a lower portion; but there were no cords and weights by which the lower could be raised. It might be pushed up and kept up when so elevated by a stick or other support; but there was a strong temptation in hot and stuffy weather for persons using the stairs to remove altogether the lower part. As long as the window was closed it was not a source of danger to anyone; but when the lower portion of it was either raised or removed, there was some risk that a child coming to it to look out would fall into the street, as did the plaintiff. Mr. Hanna tells us that the action was conducted on the issue that six days before the accident, the lower part of the window had been deliberately taken away by two persons for whose act the defendants were responsible; and although this cause of action is not stated in the pleadings, I gather from the Judge's notes that the case was thus presented to the Court by the plaintiff's counsel. Mrs. Coffee swore that two men came up the stairs and took out the window—that is the lower half of it—and left it lying against the wall, where it lay for about six days before the 22nd August. She adds that she asked one of the men what he was going to do with it, but she does not say whether he gave any answer. Her evidence on this point is peculiar. There is, I think, no doubt that there was once a lath on each side of the window, and that these laths could not be taken away except with a chisel or some similar instrument; but Mrs. Coffee does not say that anything of this kind was used. She did not know the men; and in the six days during which the

lower sash was lying in the lobby, she made no complaint to the defendant, or to Mr. Peacock, who collected the rents, although she thought the window was then in a dangerous condition. A curious piece of evidence was given by Mrs. Sullivan, who was living with her daughter in the room over Mrs. Coffee's at the time of the occurrence, but whose tenancy had ended before the trial, and who, as far as one can see, was a disinterested witness. She swore that about four days before the accident she saw Mrs. Coffee herself take out the lower part of the window and put it alongside the wall, and that some time afterwards the witness put it in its frame, in which it fitted tight enough, although there were no laths. She says that two or three days later she saw the window against the wall again, and that she put it in once more. All this was before the day of the accident, on which day the witness was ill in bed, and had a visit in her bedroom from Mrs. Coffee half an-hour before the occurrence. When it happened, her daughter put in the window and went for Mrs. Coffee, who was then in a public-house. They came back together, and Mrs. Sullivan says she heard, from her bed, Mrs. Coffee ask her daughter, "Who put in that window?" "I did," said the daughter. "Take it out," replied Mrs. Coffee, "and make Mr. McEvoy hop." This evidence in so far as it relates to the day of the occurrence is corroborated by Miss Sullivan, a girl of seventeen years of age.

The defendant was examined, and said that the window was in good condition, and that he never received any complaints about it, that he employed two men, Nolan and Smith, to do some papering and painting in the lower story, but that there was nothing to be done on Mrs. Coffee's landing; that they were the only workmen employed by him, and that Nolan was dead. Smith on being produced proved that he and Nolan did no work on Coffee's landing, and Mrs. Coffee said that he was not one of the two men. The foregoing evidence suggests that the laths had not been in their place for some time, and that the lower portion was taken out and restored by occupants of the house, according as they wished to let in fresh air, or keep out cold. I have stated what was proved on this point at some length, inasmuch as it bears on one matter strongly pressed by plaintiff's

Appeal. 1912. COFFEE v. MCEVOY. Holmes, L.J.

counsel. Dodd, J., in his notes confirms Mr. Hanna's statement that the case chiefly made at the trial was, that the defendants were brought into privity with the taking out of the sash on the occasion described by Mrs. Coffee; and he asked plaintiff's counsel did they think they had any evidence of the window having been, in fact, taken out by the defendants' servants. They, however, pressed for a question to be left to the jury on this point, and accordingly the Judge asked, "Was the window, in fact, left in an unsafe condition by persons in the employment of the defendants, acting within the scope of their authority?" To this he added some consequential questions.

It is clear from the Judge's report that he acceded to counsel's requisition with much reluctance. He said that he did not attach much weight to Mrs. Coffee's evidence, and thought that even if the jury believed her, she fell short of proving that the servants of the defendant did the act. The jury, having gone into their room, returned after a considerable absence, and asked whether it was necessary to find that the acts were or were not done by the defendants' servants, indicating at the same time a wholly different view of the case. The Judge, after mentioning this in his report, proceeds to state that he was altogether dissatisfied with the questions on his original paper. Accordingly, he withdrew them, and submitted other questions on the lines suggested by the jury. It is quite clear from what is stated in the Judge's notes that the jury did not disagree as to an answer to the question I have quoted. They were anxious to find for the plaintiff, but they would not, and could not, give an affirmative answer to it; and while the defendants' counsel protested against any questions being left to the jury, the plaintiff's counsel gladly accepted those that were substituted, in the belief that, as they had been suggested by the jury, they would be at once answered in their favour. From that time the case was dealt with by Judge and jury in a new way. It was argued on this basis in the Divisional Court; and for the Court of Appeal to send it back to be tried on an issue that had been abandoned would, on this ground alone, even if there were no other objection to such a course, be repugnant to reason and justice.

The result of the change of questions was in effect a verdict

that the window at the time of the accident was unsafe for children, by reason of the defendants having omitted the precaution of providing a reasonable guard. I offer no opinion as to whether this would give a cause of action to a child lawfully in the house. The danger was not caused by the mode in which the lower part of the window became open. If it had been opened in the most scientific way, the accident might have happened. The want of precaution as found by the jury was the fact that there was no internal or external guard to prevent a child creeping through it when open. In the want of such a guard it resembled the majority of Dublin houses, in the windows of which there are for the most part neither bars nor other protection inside or outside. I have, however, the same objection as Lord O'Brien to speculate as to supposititious cases; and I offer no opinion as to the duty of a landlord to take precautions for the safety of his tenants and persons lawfully using the tenants' premises. I deal with the obligation of the defendants on the assumption that the plaintiff was a trespasser, as undoubtedly he was. There never was a guard on this window. In this respect it was in the condition in which it always had been. There was, therefore, no act of commission by the defendants. All that can be imputed to them is that they had omitted, previous to the accident, to protect the window by some kind of bar or other means which would diminish the risk of a child falling from it when open. Now, I agree with Lord O'Brien that there is no obligation on a landlord to repair his premises for the benefit of a trespasser, and that mere omission gives no cause of action to a trespasser. The Lord Chief Baron comes to the same conclusion after an exhaustive examination of all the decisions bearing on the matter. I do not propose to follow him in this investigation, especially because I have heard no authority to support the contrary contention. Some sentences from Lord Macnaghten's judgment in *Cooke's Case* (1) have been referred to, but I am satisfied that they do not bear the meaning given to them by the plaintiff's counsel, and that the *ratio decidendi* of the noble Lord was the same as that of the other peers. Indeed, Mr. Hanna, before the end of his argument, admitted

(1) [1909] A. C. 229.

Appeal. 1912. COFFEE *v.* MCEVOY. Holmes, L.J.

that if the Court took this view of Lord Macnaughten's observations, the judgment given by Dodd, J., cannot be restored. He contended strenuously, however, that his client would be entitled to an order for a new trial. I have already stated one objection to this, to which there is no answer; and I may add to it two others. I am of opinion that there was no evidence—not even the discredited scintilla—to justify an affirmative answer to the question that was abandoned. I am also of opinion that if the lower part of the window was taken out by the defendants, this was done to repair it; and there is no obligation on a landlord to repair his house for the benefit of trespassers. I would say, in conclusion, that I do not hold that if the owner of premises were to cause damage to a trespasser thereon by a wilful or reckless act, a child and a person of mature years would be in the same position in determining the liability of such owner. The child, for example, could hardly be guilty of contributory negligence, and its helplessness might give rise to other distinctions. Everyone must feel sympathy for the plaintiff. It is, therefore, pleasant to hear that he has recovered more completely than was anticipated, and is now at school preparing for what I hope will be a useful life.

CHERRY, L.J.:—

The net question of law which we have to decide in this case is what is the extent of the liability of an owner of land towards persons trespassing thereon, for injuries occasioned by the negligence of himself or his servants? It is admitted, or at all events not seriously disputed, that the plaintiff, though a child of only six years of age, has no greater rights than those of a trespasser, by reason of the default of his father to give up possession on the expiration of his tenancy. The learned Judge who tried the case directed the jury, in point of law, that a duty was cast upon defendants to take reasonable precautions to prevent the premises being in such a position as to be dangerous to young children residing *in fact* in the house; and that not merely from the acts of their own servants, but also from the acts of any person who had access to the house. With every respect for the learned Judge, I think he has, in this direction, gone a considerable degree

beyond any of the authorities which have been cited to us. To a child *lawfully* being upon the premises, even though as a mere licensee, there is undoubtedly a positive duty of some kind to protect from injury; but if the child is, as in this case, a trespasser, *unlawfully* upon the premises, I do not think that the owners of the premises can be held liable for damage done to him by mere negligence, either of themselves or their servants. An owner is, in such a case, liable only, in my opinion, where the injury is due to some wilful act, involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser; or some act, the direct and immediate effect of which the defendant must be presumed to have known would be to cause injury to the trespasser.

There is no evidence of any such act in the present case. The most that can be proved (if it can be proved) is negligence by omission on the part of servants of the defendants in not replacing the sash of the window after it had been taken down. That is not sufficient to render the defendants liable; and I therefore agree that the verdict for the plaintiff cannot be sustained.

Solicitor for the plaintiff: *J. J. Mullan.*
Solicitor for the defendants: *W. V. Seddall.*

W. G.

Appeal. 1912.

May 10.

O'NEILL, Applicant; THE COUNTY COUNCIL of the COUNTY BOROUGH of BELFAST, Respondents (1).

Malicious injury to property—Compensation—Malicious breaking of windows on successive days—Continuous act—Malicious Damage Act, 1861 (24 *&* 25 *Vict. c.* 97, *s.* 51)—*Local Government (Ireland) Act,* 1898 (61 *&* 62 *Vict. c.* 37), *sect.* 5.

C., on being refused drink in O.'s public-house on a certain evening, went outside, and, after maliciously throwing a weight through one plate-glass window of the house, was about to break a second window with a hatchet, when he was stopped by an assistant of O.'s, whereupon he ran away. C. returned at 12 o'clock the following day and maliciously broke the second window. The value of each window was under, but the aggregate value of the two windows exceeded, £5.

Held (by the Lord Chancellor and Cherry, L.J., Holmes, L.J., *diss.*), that the wrongful acts of C. constituted one continuous transaction for which he could have been indicted under sect. 51 of the Malicious Damage Act, 1861, and that, accordingly, O. was entitled to compensation under sect. 5 (1) of the Local Government (Ireland) Act, 1898.

Case Stated by the Hon. Mr. Justice Boyd, as follows:—

1. At the Spring Assizes for the county of the city of Belfast, which opened on 18th March last, there came before me an appeal from an order of the Recorder of the city of Belfast, dated 26th February, 1912, refusing without costs an application under the provisions of the Local Government (Ireland) Act, 1898, for the sum of £8 0*s.* 5*d.* as compensation, for that "between the hours of 6 o'clock on the night of Monday, 22nd January, 1912, and 1 o'clock on Tuesday, 23rd January, 1912, some person or persons wilfully, wantonly, and maliciously, broke, damaged, injured, and destroyed, at 161 and 163 Silvio Street, in the county borough of Belfast, two embossed and lettered plate-glass windows, the property of the applicant, to the value of the amount of the said claim, £8 0*s.* 5*d.*"

(1) Before The Lord Chancellor, and Lords Justices Holmes and Cherry.

Appeal. 1912. O'NEILL, *Applicant;* BELFAST CO. COUNCIL, *Respondents.*

2. On the hearing of the said appeal before me, the following facts were admitted:—The applicant carries on business as a publican at 161 and 163 Silvio Street, Belfast. At or about the hour of 7 o'clock, p.m., on Monday, 22nd January, 1912, a man called James Cooke, who was in applicant's public-house, was refused drink by the applicant or his assistant named Thomas Woods. Cooke thereupon left the applicant's premises, and having a hatchet and a 7 lb. weight in his hands, he threw the weight at and broke a plate-glass window pane, in the front of applicant's public-house. Hearing the crash, the applicant's assistant, Thomas Thompson, rushed out of the front door, and seized the hatchet in Cook's hand as he had it raised in the act of aiming a blow at the second plate-glass window pane, also in the front of the applicant's premises. Thompson took the hatchet from Cooke, who thereupon ran away down a side street. Had it not been for the intervention of Thompson, the second window pane would certainly have been broken. On the following Tuesday, 23rd January, 1912, at about the hour of 12 o'clock noon, Cooke returned to the applicant's premises, and picked up a dog which was on the foot-path, and flung it at the plate-glass window pane, at which he was aiming the blow on the previous day, when the hatchet was seized. The window pane was thus broken and destroyed. Cooke was arrested after breaking the second window pane, and was dealt with by the magistrates at Petty Sessions. One window pane cost the applicant £4 0*s.* 2*d.* to have it replaced, and the other window pane cost him £4 0*s.* 3*d.*; the total amount which the applicant had to pay for replacing the window panes was £8 0*s.* 5*d.*, which it was agreed should be the amount of compensation to be awarded to the applicant in the event of it being held that he was entitled to succeed.

3. On behalf of the applicant, it was contended that the case came within the provisions of section 51 of the Malicious Damage Act, 1861, as the total amount of the damage done to the applicant's premises exceeded £5.

4. On behalf of the county council of the borough of Belfast, it was contended that the breaking of the two window panes on different occasions constituted two distinct and separate acts,

Appeal. 1912.

O'NEILL, *Applicant;* BELFAST CO. COUNCIL, *Respondents.*

and that as the value of each window pane did not exceed £5, the man James Cooke could not be indicted under section 51 of the Malicious Damage Act, 1861, and therefore the applicant could not succeed in his application for compensation.

5. I was of opinion, and so held, that it was the obvious intention of the man Cooke to break both the panes of glass, on the evening of the 22nd January, when he was interrupted, and that he returned on the 23rd January, to complete this intention; that the breaking of the two window panes was, in the circumstances, one continuous transaction, and could be the subject of an indictment under section 51 of the Malicious Damage Act, 1861; and that it was in fact as much one act as it would have been had the window panes been broken by two separate blows on the 22nd January. I therefore allowed the applicant's appeal with costs in the County Court and of appeal, but on the application of counsel for the county council of the county borough of Belfast, who submitted that the matter was one of great importance to his clients, I agreed to state a case for the opinion of His Majesty's Court of Appeal in Ireland, pursuant to the provisions of Rule 13 of the County Court Appeals (Ireland) Rules, 1900, on the terms that, whether successful or not in the case stated, the said county council should pay to the applicant his costs of and incidental to such case stated and the hearing thereof.

The question for the opinion of the Court is whether or not I was correct in the conclusion at which I arrived. If the answer to this question be in the affirmative, the applicant is to be entitled to compensation of £8 0*s.* 5*d.*, with costs in the County Court and of appeal, and of the case stated as aforesaid. If the answer be in the negative, the applicant is to be entitled to his costs of the case stated only.

James Andrews, for the applicant:—

This should be regarded as one continuous transaction; and as the value of the two windows broken exceeded £5, the offence was an indictable one under section 51 of the Malicious Damage Act, 1861, and the applicant is accordingly entitled to

compensation: *Reg.* v. *Shepherd* (1) rules this case. There it was held that the value of the trees which were damaged might be put together, although the wrongful acts of the prisoner extended over a month. As to including acts constituting one continuous offence in a single indictment, see also *Reg.* v. *Bleasdale* (2); *Reg.* v. *Henwood* (3). In *Reg.* v. *Townley* (4), where the prisoner wrongfully killed rabbits, which he placed in a ditch, and returned three hours afterwards, and began to remove them, it was held that there was no larceny, as the taking of the rabbits, and the removal of them, were one continuous act. [He also referred to *In re Borrowes* (5).]

T. W. Brown, for the respondents:—

The breaking of the one window was a distinct and separate act from the breaking of the other, and the two offences committed on different days could not be included in an indictment for a single offence under section 51 of the Malicious Damage Act, 1861. In *R.* v. *Petrie* (6) it was held that, to support an indictment for stealing to the amount of forty shillings in a dwelling-house, there must be evidence of property having been stolen to that amount at one and the same time, and that the several values of different portions of property stolen at different times could not be added together. *Reg.* v. *Williams* (7) shows that evidence of damage committed at several times, in the aggregate, but not at one time, exceeding £5, will not sustain an indictment under section 51 of the Malicious Damage Act, 1861. That case cannot be differentiated from the present.

THE LORD CHANCELLOR:—

This case raises an important question on which each of us is bound to express his own view.

For myself, I think that if this man, Cooke, had not been stopped by the intervention of the attendant, Thompson, he would

(1) L. R. 1 Cr. C. R. 118.
(2) 2 Car. & K. 765.
(3) 11 Cox, Cr. C. 526.
(4) L. R. 1 Cr. C. R. 315.
(5) [1900] 2 I. R. 593.
(6) 1 Leach Cr. Cas. 294.
(7) 9 Cox, Cr. C. 338.

Appeal. 1912.

O'NEILL, *Applicant;* BELFAST CO. COUNCIL, *Rsepondents.*

The Lord Chancellor.

certainly have completed his malicious aim of breaking the second window on the occasion of his breaking the first; on the appearance of Thompson, however, he ran away. There is no evidence where he went to, but he reappeared the next morning and broke the second window in the way described. The question is, whether or not the learned Judge was right in coming to the determination on the evidence that the whole occurrence was in effect one single continuous transaction. For my part, particularly having regard to the judgment in *Reg.* v. *Shepherd* (1), I am of opinion that the learned Judge was correct in the view he adopted. In *Shepherd's Case* (1) the Court was dealing with a series of acts, the stealing of eight oak trees, which took place, not within the limit of a few hours, but which actually extended over a period of a month, and the Court, in that case, comprised of very distinguished Judges, and presided over by Cockburn, C.J., came to the conclusion that those wrongful acts should be regarded as one continuous transaction. Cockburn, C.J., there said :—" There is evidence of one continuous taking, and that was properly left to the jury." I must say that, if that is the law, *a fortiori* in this case the wrongful acts of the offender should be regarded as a single offence; he was interrupted in the operation of his acts on the 22nd January; he ran from Thompson as he would have from the police; and, when he thought he was free to complete his purpose, he returned to do so. To my mind, this was clearly one continuous transaction, and the learned Judge was right in so regarding it.

As to *Reg.* v. *Williams* (2), so strongly relied on by the respondents' counsel, there is not, so far as appears from the report of the case before us, a particle of evidence to show that the wrongful acts there in question were connected with one another, nor does there appear any foundation for the suggestion that they were continued acts of malice, as were those in *Shepherd's Case* (1); they may have been, for what we can tell, entirely independent transactions, and no suggestion appears to have been made by the Solicitor-General in that case that they bore any other character. We, of course, yield the highest deference to a decision such as

(1) L. R. 1 Cr. C. R. 118. (2) 9 Cox, Cr. C. 338.

that, but having regard to the absence of all evidence that there was any connexion between the wrongful acts the Court was there dealing with, I do not conceive that that case can be at all weighed in the balance as against the authority of *Reg.* v. *Shepherd* (1), which is quoted as an authority in Archbold, and there accepted as law on this question.

As to the manner in which this case was dealt with by the magistrates, and the punishment inflicted by them, I express no opinion. I have no right to do so; the magistrates may have acted entirely within their jurisdiction, and on the case as presented to them, it may have been quite competent for them to hold that there had been two different offences.

It must not be assumed that I am holding them to blame for the manner in which they acted, or that I suggest that they had no jurisdiction to make the order they did. We have to deal with an entirely independent matter on the full evidence as stated by Boyd, J., and in the result I concur with his decision and judgment that this matter was capable of being regarded as, and was, one continuous act of malice which was really only suspended by the accidental interference of Thompson, after which the offender returned to his original purpose and wilfully completed it. I hold, therefore, that he could have been indicted for that offence under section 51 of the Malicious Damage Act of 1861, and that the applicant is accordingly entitled to compensation.

HOLMES, L.J.:—

If I had been in the position of Boyd, J., I should have had no hesitation in holding that no indictable offence had been committed under the Malicious Damage Act, 1861, on the ground that the breaking of one window was an act distinct and independent from the breaking of the other, the only connexion between the two being that both arose from a feeling of hostility on the part of the offender which, in my opinion, is not sufficient. To hold that it was would lead to very startling results never contemplated by the Legislature.

(1) L. R. 1 Cr. C. R. 118.

Appeal. 1912. O'NEILL, *Applicant*; BELFAST CO. COUNCIL, *Respondents.* Holmes, L.J.

I, however, readily admit that other minds might draw the inference from the evidence taken by Boyd, J., but I am satisfied that it is the duty of this Court to draw its own inference. Moreover, apart from what I have already said, it seems to me that *Reg.* v. *Williams* (1) is a distinct authority in favour of the County Council on identical facts, and I am not prepared to differ from the decision of as strong a Court as has ever sat in Ireland during the last fifty years.

CHERRY, L.J.:—

I agree with the view of the Lord Chancellor. The question of the unity of a number of individual acts so as to form one transaction, whether for the purpose of criminal or civil law is, to my mind, rather a question of fact than of law; or, perhaps it would be more correct to say, a question of mental intuition; one mind may unify a number of facts where another would refuse to do so, and the same mind may unify a set of facts for one purpose, and refuse to do so for another. If a burglar breaks into my house, and takes away silver spoons from the dining-room, books from the study, and a clock from the drawing-room, each of these acts is a separate act, and the wrongdoer could be indicated for larceny of any one of the articles stolen by him. Separate bills might be prepared for each of the larcenies, or all might be included in one indictment, according as the pleader viewed them as separate acts, or as one transaction. In the same way, if a man wrongfully breaks several panes of glass, each breakage is a separate act, and may be regarded as such; but if he breaks the panes without any intermission of time, everyone would look upon the matter as one transaction. The question in each case is really a matter of degree, whether the acts ought to be regarded as one transaction or as several.

Here Boyd, J., has come to the conclusion that the breaking of the windows was in effect one continuous transaction, and I cannot say that he was wrong in so deciding. I do not consider that we

(1) 9 Cox, Cr. C. 338.

are coerced by authority to hold that he was wrong. In *Reg.* v. *Shepherd* (1), a decision of very high authority, the facts were not at all so strong for holding the wrongful acts in question one transaction as they are in the present case. There an exactly similar issue to the one now before us had to be determined, viz., whether the value of the property maliciously injured exceeded £5, and, although the cutting and removal of the trees was extended over a period of at least a month, and none of the trees was of the individual value of £5, the Court held that the wrongful acts amounted to one continuous transaction; and as the aggregate value of the trees exceeded £5, the prisoner was held to have been rightly convicted notwithstanding that his wrongful acts had extended over such a lengthy period and had occurred in the intervals of his lawful work in cutting other trees. It is said that *Reg.* v. *Williams* (2) is inconsistent with that decision, but the facts are not fully stated in the report of that case, and it is impossible for us to say whether there is any conflict between the two cases or not. As to the proceedings before the magistrates, they cannot be a bar to the applicant's right of relief; he was not represented before them, and, so far as we can tell, the question now at issue was never discussed before or determined by the magistrates at all.

Under these circumstances I have come to the conclusion that the decision of Boyd, J., was correct.

Solicitor for the applicant: *J. S. Finnegan.*
Solicitor for the respondents: *D. F. Spiller.*

R. ST. J. C.

(1) L. R. 1 Cr. C. R. 118. (2) 9 Cox, Cr. C. 338.

K. B. Div.
1912.
April 29.

CRANE *v.* NAUGHTEN (1).

(1911. No. 13712.)

Contract—Letting of grazing for six months—Relation of landlord and tenant—Interest in land—Written memorandum—Deasy's Act, 1860 (23 & 24 *Vict. c.* 154), *s.* 4.

The plaintiff, a landlady possessed of freehold lands, instructed an auctioneer to put up for sale by public auction the grazing of a certain portion of the said lands for a period of six months. In pursuance of such instructions the auctioneer duly offered the grazing for sale, and accepted the bid of the defendant, making at the time the followig entry in his book:—"Miss Crane's meadows—Bernard Naughten, £13 10*s.*" The plaintiff on learning the name of the purchaser refused to give him the grazing. The defendant, notwithstanding such refusal, put his cattle on the grazing, and kept them there. Plaintiff brought an action to recover possession and for an injunction, alleging there was no memorandum in writing of the contract sufficient to satisfy the Statute of Frauds.

Held, that the contract was one "in respect to lands whereby the relation of landlord and tenant was intended to be created for a definite period of time" less than a year, within the terms of section 4 of Deasy's Act, 1860, and therefore did not require to be in writing.

Held, also, that if the Statute of Frauds were applicable to such a contract, such note or memorandum as aforesaid would be insufficient to satisfy that statute.

New Trial Motion.

In October, 1911, the plaintiff, Miss Alice Mary Crane, who is the owner in fee of certain lands known as Cloonakillia, gave instructions to Mr. Robert English, auctioneer, Athlone, to set by auction the winterage of a portion of the said lands, containing about 30 acres statute measure. In pursuance of such instructions the auctioneer published an advertisement by poster, and in the local press.

(1) Before Gibson and Boyd, JJ.

The following is a copy of the advertisement:—

"WINTER GRAZING.

"Subscriber is instructed by Miss Crane to let by auction on the lands, on Monday next, October 9th, about 30 acres of the lands of Cloonakillia, within three miles of Athlone, for grazing purposes, from date of letting to 1st April, 1912.

"There is a heavy crop of grass on the farm, as it has not been stocked since 1st May.

"Terms at letting, at 12 o'clock.

"ROBERT ENGLISH,
"Auctioneer, Athlone."

A man named McManus attended at the sale, and offered £13 10*s*., which the auctioneer accepted, stating "that any bid should be submitted to Miss Crane." The name of the defendant, Bernard Naughten, was then given to the auctioneer as the purchaser for whom McManus had bid; and the auctioneer made the following entry in his book, opposite the words "Miss Crane's meadows": "Bernard Naughten, £13 10*s*." But some days afterwards he added to this entry, so as to make it read: "Miss Crane's meadows—from letting to 1st April—Bernard Naughten, £13 10*s*. Sent herd to ask if Miss Crane was satisfied. October 14, told Bernard Naughten Miss Crane objected." Miss Crane on being informed of the identity of the purchaser refused to accept him, and in consequence the auctioneer informed the defendant, Naughten, that he was not accepted. Notwithstanding, the defendant insisted on putting his cattle on the lands; plaintiff's herd drove them off on several occasions, and defendant as often put them back again. Plaintiff's solicitor then wrote to defendant threatening legal proceedings if the cattle were not withdrawn. Naughten continued to keep his cattle on the lands, and the plaintiff thereupon issued a writ claiming damages for wrongful entry upon her said lands and depasturing cattle thereon, and for an injunction to restrain the defendant from continuing to depasture his cattle on the plaintiff's lands and from interfering with the plaintiff, her servants, and agents, in her use of the said lands. Defendant moved to remit the action to the County Court; and, by consent,

K. B. Div. 1912. CRANE v. NAUGHTEN.

an order was made setting the action down for trial without further pleadings at the next ensuing Roscommon Spring Assizes before a Judge without a jury. The action came on before Mr. Justice Kenny, on the 12th of March, 1912. The following is a copy of the Judge's notes of the trial :—

"This action was tried before me without a jury at the Roscommon Spring Assizes, on the 12th March, 1912. It was one of trespass to land.

"I refer to the pleadings.

"Mr. McCormack was for the plaintiff. Leonard for the defendant.

"Mr. M'Cormack stated auction of the grazing farm, October to April. Mr. McManus the ostensible purchaser.

"The following evidence was given:—

"Alice Mary Crane, plaintiff—'I own these lands. In October, 1911, I instructed Mr. English to let the lands for grazing. My man told me of the result of the auction. I signed nothing.'

"Cross-examined—Defendant had had the grazing for some years, £25 for eleven months. The land had been meadowed in 1911.

"Robert English, an auctioneer—'Got instructions from plaintiff to let the grazing on 9th of October, 1911. There were only five people at the auction. The defendant was not there. I said, "I'll withdraw," and was about driving away when either O'Neill, or McManus, a brother-in-law of defendant, offered £10, and then £12 ; £13 10*s.* was then suggested. I said that any bid should be submitted to Miss Crane. O'Neill said it was for defendant, and I entered his name in my book (book entered). On the 14th October, I told defendant he was not accepted.'

"Cross-examined—'That is the auction bill (entered), and that is the advertisement in newspaper (entered) ; all I wrote at the auction was "Bernard Naughten, £13 10*s.*" The rest I wrote in afterwards. I don't recollect meeting Mr. Percy on my way home

from the auction. The defendant offered me the money afterwards. I may have said, "I may take it on myself to say, it is time enough."'

"Thomas Shine—'Herd to plaintiff. In October, defendant's stock came to the land. I drove them off. He put them back. I drove them off about six times. The defendant drove off the plaintiff's cattle. The defendant's cattle have remained on the land since, and are there still.' (Leonard admits this.)

"Plaintiff closes.

"Leonard asks me for a direction—I refuse.

"McManus—'Brother-in-law of defendant. Attended auction by defendant's instructions, O'Neill and Newell were there. Shine and his father were there, and Fitz Gerald. No conditions of sale were read. English waited until 12 o'clock, looked at his watch, said he'd take the biddings. He said the money might remain out till January, though he had no instructions from the plaintiff. I bid £10. O'Neill said, "Let it be £12." English said it should be £15. I said £13 10*s*. O'Neill said, "Bernard is the purchaser." English said he thought as much.'

"Cross-examined—'When I bid the £13 10*s*., the thing was closed. English never said he'd withdraw. He came in a trap. He did not proceed to drive away. I never heard of any trouble between the plaintiff and defendant before. There were some five or six acres of land of plaintiff's put up, and title could not be made.'

"Newell—'In defendant's employment. Was at auction. Mr. English pointed to the poster. He said a purchaser need not pay till January. I heard the bidding. I heard O'Neill say the defendant was the purchaser. I put on the defendant's cattle. I found six of Miss Crane's cattle. I brought them to plaintiff's place.'

"Cross-examined—'Mr. English did not make as if to go away. He did not say he'd withdraw. The defendant had some trouble with the plaintiff—not for last two years. He had not grazing from her for the last season.'

"Thomas O'Neill—'Farmer. Was at the auction. Mr. English pointed to the poster. He said he did not want the money

K. B. Div. 1912.

CRANE v. NAUGHTEN.

until January. I told Mr. English that the defendant was the purchaser.'

"Patrick Burns—'Servant to English.'

"FitzGerald—'At auction Mr. English never suggested he'd have to consult the plaintiff. He mentioned her name in connexion with the money. When Naughten was named, English said, "I thought as much."'

"Mr. Percy, veterinary surgeon—'I met Mr. English as I was going out. He said he had let the lands.'

"B. Naughten, defendant—'I was speaking to Mr. English about this sale before the sale. I told him I'd send up a man to bid. Mr. English afterwards said the plaintiff was not satisfied with the price.'

"Cross-examined—'The day of the auction, I heard the plaintiff would not let the lands to me. Before that we had some controversy as to title and about fences. I was never on bad terms with her.'

"Defendant closes.

"Mr. Leonard asks for a finding and judgment for the defendant. On the assumption that a grazing letting is within the 4th section of the Statute of Frauds, he contends that the section is satisfied by the entry in the auctioneer's book, and the reference to the poster, and he also submits that there was part performance.

"Mr. McCormack, *contra*, asks me to hold as a matter of fact, that at most the sale was one conditional on the plaintiff's assent to it being obtained, and of course, submits that there was no memorandum in writing within the statute binding on his client, and no part performance. Neither side referred to any text-book or authorities. I read from Roscoe on Evidence as to what would constitute a sufficient writing and signature under the statute, and *White* v. *Proctor* (1) and *Emmerson* v. *Heelis* (2) were referred to, but there was no real argument. I held that the sale was an absolute one, and not merely conditional on plaintiff's assent being obtained, and thought, though not without great doubt, that there was a sufficient memorandum within the

(1) 4 Taunt. 209. (2) 2 Taunt. 38

Statute of Frauds. No other matter was suggested or argued save those I have mentioned.

"I found for defendant, and gave judgment accordingly.

"W. KENNY,

"31st March, 1912."

The plaintiff now moved for an order that the verdict and judgment entered for the defendant be set aside, and in lieu thereof verdict and judgment entered for the plaintiff, or, in the alternative, that a new trial be directed, on the following grounds:—That the learned Judge failed to direct himself according to law, and misdirected himself in point of law; that the learned Judge should not upon the evidence have determined that the entry in the auctioneer's book constituted or was intended to constitute a binding contract between the plaintiff and the defendant, or did in fact bind the plaintiff as seller, and the defendant as buyer, or either of them, or that the alleged sale was an absolute or unconditional sale, or that there was any sufficient memorandum in writing to satisfy the Statute of Frauds; and that the verdict was against evidence and the weight of evidence, and that there was no evidence to support the findings or verdict.

Littledale, K.C., and *McCormack*, for the plaintiff:—

This is an interest in lands within the meaning of the Statute of Frauds, and the entry in the auctioneer's book is clearly insufficient to satisfy the statute, for it does not incorporate the poster or in anyway refer to it; an auctioneer has no power after the sale to substitute the name of the principal for the name of the person who gave the bid, the bid being accepted without knowing the bidder was an agent; on the evidence there is no binding contract here. [Counsel cited *Dewar* v. *Mintoft* (1); *Pierce* v. *Corf* (2); *Rainbow* v. *Howkins* (3); *McManus* v. *Fortescue* (4): Roscoe's Nisi Prius (1907 ed.), at pp. 318 and 534.]

(1) [1912] W. N. 94.
(2) L. R. 9 Q. B. 210.
(3) [1904] 2 K. B. 322.
(4) [1907] 2 K. B. 1.

K. B. Div. 1912. CRANE v. NAUGHTEN.

The Solicitor-General (*Ignatius O'Brien, K.C.*) and *Leonard*, for the defendant:—

The contract falls within the limits of sect. 4 of Deasy's Act, and does not require to be in writing. But even the provisions of the Statute of Frauds are complied with by taking the poster and the entry in the auctioneer's book: *M'Causland* v. *Murphy* (1).

McCormack, in reply:—

Although the letting here is an interest in lands within the provisions in the Statute of Frauds, it is not an interest in land within the meaning of those words as used in Deasy's Act: *O'Flaherty, Landlord*; *[illegible]lly, Tenant* (2).

GIBSON, J.:—

If this action had been tried before my brother Boyd or myself, it may be that we would have arrived at a different conclusion of fact. We, however, start with a finding by Mr. Justice Kenny that the contract of sale now in dispute was absolute, and not conditional. There is a good deal to be said in favour of the view that the auctioneer did expressly state at the sale that the consent of the lady who was the owner was necessary; the carelessly kept book of the auctioneer is strong to indicate that the contract was conditional. But my brother Kenny has found against that view.

What is the nature of the contract here? When parties to a contract reduce it to writing, nothing can be added to, or taken from, the writing; it speaks for itself, and is final and conclusive. But the document required by the Statute of Frauds is of a different character. It is a memorandum of what the contract is. Accordingly, if the memorandum is not in accordance with the true contract, it is a bad memorandum. For example, if a person sells his horse to another person at a certain price, but with a condition, then a memorandum in which that condition is not expressed would be a defective one. Now, what was the true

(1) 9 L. R. I. 9. (2) [1909] 1 I. R. 223.

contract in the present case? On my brother Kenny's hypothesis, it was a contract to let land for grazing for six months certain, at a sum of £13 10*s.*, the plaintiff being the letter, and the defendant Naughten, the tenant. I leave out of consideration for the present any question of agency. That being the contract, the first question that arises is: Was the contract one within the Statute of Frauds; or, was it one within Deasy's Act? I think this letting was intended to be a letting of an interest in land within *Carrington* v. *Roots* (1), and would have required a writing under the Statute of Frauds. The argument is that the Statute of Frauds is displaced by the 4th section of Deasy's Act. That is a point of some difficulty. Deasy's Act defines "lands" and "tenants." "Lands" includes tenements of every tenure, corporeal or incorporeal. Section 4 provides for a writing in cases where the relation of landlord and tenant is intended to be created for any interest in land. If the contract in this case be for an interest in land, which it certainly is, the only question is: Was the relation of landlord and tenant intended to be created? If a person lets his land for five years for one hundred sovereigns down, the relation of landlord and tenant is created as much as if he got a rent for it by annual or semi-annual payments. You cannot describe the occupier except as a tenant. I do not think it is necessary for the action of Deasy's Act that the rent should be an annual one. It is sufficient if there be a rent in a bulk sum. I think the contract here created the relation of landlord and tenant in respect of an interest in lands. I also think it was a letting of lands itself. Although Lord Justice FitzGibbon has held that an agistment contract in respect to land does not disturb the tenancy of the tenant, it is otherwise with this grazing letting. The contract here purports to be a contract for exclusive grazing for a definite period. The reason the formula of eleven months has come to be used is because, if twelve months were put in for a grazing letting, there is a special section of the Land Act, 1881, section 16, which says that that would be a yearly tenancy. That fact shows that the eleven months is a term in such letting that relates to tenancy

(1) 2 M. & W. 248.

K. B. Div. 1912.

CRANE v. NAUGHTEN.

Gibson, J.

of land. This contract therefore comes within section 4 of Deasy's Act, and being for less than a year need not be in writing.

Then comes the question—Was there a contract at all? Mr. Littledale says there was no contract; and, further, that when an auctioneer at a public auction knocks down an article to an agent without knowing the principal, the auctioneer has no right afterwards to substitute another person for the agent, namely, the true principal. That question might require argument; but it is not necessary to decide it in this case. In this particular case what happened was, that a bid was given and ultimately £13 10*s.* was suggested and accepted. It was at once stated that the true purchaser was Naughten, and there and then his name was written down; nobody else was named as the purchaser. There is no doubt about the principles applicable to principal and agent. They are both one for the purpose of bargain. I am satisfied that nobody ever dreamt that this M'Manus was buying for himself. I have come to the conclusion that the contract here need not be in writing under the statute, and that there was a true contract of purchase of a six months' tenancy within the competence of the auctioneer.

There is nothing else remaining except the purely theoretical question under the Statute of Frauds, which does not apply, as the case falls within Deasy's Act. The Statute of Frauds requires a memorandum in writing of the true contract. I have stated what this contract was. Is it evidenced in writing? It emphatically is not. The original limit of six months is not to be found in the memorandum written by the auctioneer: that part of the entry was made afterwards. You cannot get at the six months without reading the green poster. We may believe that the green poster was part of the arrangement. But the defect is, that the auctioneer did not profess to sell under the green poster, and if he had, he must incorporate it in his book. If an auctioneer sells on his catalogue, he must refer to it in his auction-book: *Pierce* v. *Corf* (1) is an authority for that proposition. In *Boydell* v. *Drummond* (2), which is still law, it was held that documents

(1) L. R. 9 Q. B. 210. (2) 11 East, 142.

relied on as constituting the contract must refer to each other in such a way as to dispense with parol evidence of connexion.

In the result we agree with the decision of Mr. Justice Kenny, and confirm his judgment. It is certain on the learned Judge's note that the question of fact has been found against the plaintiff, but the only question of law that was argued before him, and on which the case proceeded, was whether there was any contract within the Statute of Frauds. We are against the learned Judge's view on that point, which was expressed with much doubt, and the case is going before us on another ground altogether, which, if it had been argued on the trial, would probably have prevented any new trial motion at all. The plaintiff has succeeded on the only point she thought she had to meet, and the defendant has succeeded on a point that was not made below, and, therefore, the parties must abide their costs of this new trial motion.

BOYD, J., concurred.

Solicitor for the appellant: *Charles E. Fair.*
Solicitor for the respondent: *P. V. C. Murtagh.*

J. M.

Appeal.
1912.

Feb. 26, 27, 28.
April 17.

THE GOVERNING BODY OF UNIVERSITY COLLEGE, CORK, APPELLANTS; THE COMMISSIONER OF VALUATION IN IRELAND, RESPONDENT (1).

Rates—Exemption—Hereditaments and buildings used for public or exclusively charitable purposes—University College—Fees paid by students bound by charitable trust—Parliamentary control over funds—15 & 16 Vict. c. 63, s. 16—17 & 18 Vict. c. 8, s. 2—Irish Universities Act, 1908 (8 *Edw.* 7, *c.* 38).

University College, Cork, one of the constituent Colleges of the National University of Ireland, provided the highest class of education and instruction, and was open to all His Majesty's subjects: fees were charged to all students; these fees, however, were not payable to the professors, but were brought into the general funds of the College; the College was bound to present annual accounts of all receipts and expenditure to the Controller and Auditor-General, and these accounts, together with the report of the Controller and Auditor-General, were to be laid before Parliament.

Held, that on these facts the hereditaments and buildings of the College were exempt under the Irish Rating and Valuation Code, on the ground that such hereditaments and buildings were altogether of a public nature and used for public purposes.

Judgment of King's Bench Division ([1911] 2 I. R. 593) affirmed.

APPEAL by the Commissioner of Valuation from the judgment of the King's Bench Division of the 29th June, 1911. See [1911] 2 I.R. 593, where the hearing of the case in the King's Bench Division is reported and the case stated by the Recorder of Cork, containing a summary of the statutory provisions bearing on the question and a full statement of the facts is given.

The Attorney-General (*The Rt. Hon. Charles A. O'Connor, K.C.*), *R. Doyle, K.C.*, and *The Hon. C. T. Atkinson*, for the appellant.

Ronan, K.C., *Herbert Wilson, K.C.*, and *A. E. Clery*, for the respondents.

The arguments of counsel and the authorities cited will be found sufficiently referred to in the judgments of the Lord Chancellor and Holmes, L.J.

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

Appeal.
1912.

UNIV. COLL., CORK
v.
COMMR. OF VALUATION.

April 17.

THE LORD CHANCELLOR:—

This is an appeal on the part of the Commissioner of Valuation against the order of the King's Bench Division, affirming the ruling made by the Recorder of Cork to the effect that the lands, tenements, hereditaments and premises, the property of University College, Cork, should have been distinguished by the appellant in making out the lists or tables of valuation, pursuant to section 2 of 17 Vict. c. 8. The Recorder based his judgment on the view that the property mentioned was altogether of a public nature, and used for public purposes within the meaning of 15 & 16 Vict. c. 63, s. 16, and 17 Vict. c. 8, s. 2. The Recorder expressed no opinion on the question as to whether the property was exclusively used for charitable purposes.

Two of the learned Judges in the Divisional Court, Mr. Justice Madden and Mr. Justice Wright, gave their judgments in favour of the view taken by the Recorder, but while Mr. Justice Kenny said that he preferred to base his judgment on the ground that the property was used exclusively for charitable purposes, he appears to me to have said nothing to leave the impression that he would have been prepared to reject the view taken by the learned Judge, had the case to be decided on that ground.

In opening the appeal in this Court, the learned Attorney-General argued it chiefly with reference to the right of the respondents to have their property, which constitutes the College of Cork, ranked in the denomination of buildings, lands, and hereditaments, dedicated to or used for public purposes within the meaning of section 63 of 1 & 2 Vict. c. 56. He disputed that right, as I remember his argument, on a particular view which he presented as to the construction of that Act and section, and not so much because he challenged the public character of the College. The Attorney-General in no way laid any stress on the special words occurring in section 2 of 17 Vict. c. 8; and his whole contention, as I followed it, had reference to section 63 of the Act of 1838. I will deal with the case along the lines followed by the Attorney-General, and, as I proceed, I will consider specifically the arguments presented by him.

Appeal.
1912.
UNIV. COLL., CORK v. COMMR. OF VALUATION.
The Lord Chancellor.

We are fortunate in being able to consider this important case in the light of the law now settled in this country, and out of the reach, as long as it stands, of all controversy. *The Londonderry Bridge Case* (1) was, I think, a plain authority to the effect that the exemption from poor-rate under section 63 of 1 & 2 Vict. c. 56, of buildings, lands, and hereditaments dedicated to or used for public purposes, was in no way qualified by the Act of 1854. On an examination of the judgments of Lord O'Hagan, Baron Fitzgerald, and Chief Justice Monahan, it appears clearly, in my opinion, that those learned Judges acted definitely on that view. The decision, however, having been made in 1868, doubts arose in many quarters as to the meaning and effect of the new words introduced into section 2 of the Act of 1854, dealing with the hereditaments and tenements to be distinguished in the valuation lists or tables, as being of "a public nature" and "occupied for the public service." The difficulty, however, has been resolved, as has been pointed out by the Lord Chief Baron, in his judgment in *Moore* v. *Boyd* (2), by the important decision, so often referred to in the course of this appeal, of *The Commissioner of Valuation* v. *The Sligo Harbour Commissioners* (3). It would be a superfluous course for me to reproduce the discussion of this matter made by the Lord Chief Baron, in his reported judgment in *Moore* v. *Boyd* (2), but I have considered the subject, as well, upon my own responsibility. I agree with what the Lord Chief Baron has said concerning *The Sligo Harbour Commissioners' Case* (3), and that it has conclusively decided that, in fact, the class of hereditaments and tenements described in section 2 of 17 Vict. c. 8, as being of "a public nature" and "occupied for the public service" is co-extensive with those indicated in sect. 63 of 1 & 2 Vict. c. 56, under the terms, "any buildings, lands, or hereditaments dedicated to or used for public purposes." The two sections, accordingly, must in the present case be construed and applied in the sense of that decision.

The notable exception contained in the proviso in section 63 of the Act of 1838, referring to cases where there is a "private

(1) I. R. 2 C. L. 577.
(2) [1911] 2 I. R. 579.
(3) [1899] 2 I. R. 214.

profit or use" remains intact, and it is unquestionable that the effect of these words was an express and essential part of the foundation for the judgments in *The Londonderry Bridge Case* (1), *The Sligo Harbour Case* (2), *The Belfast Harbour Case* (3), and *The Pembroke Urban District Council Case* (4). In them was found the answer to the objection taken in the cases just mentioned on the ground of the receipt of tolls, dues, and other charges in respect of the properties in question. There is apparently no corresponding provision in the law of England upon the subject; and certainly not in the Statute, 43 Elizabeth, c. 2. As a consequence the test of "beneficial occupation" discussed in *The Mersey Docks Case* (5) cannot be applied in this country as in England, for in Ireland, in the case of property in the category we have been dealing with, it is only where a private profit or use is directly derived therefrom that the exemption from poor rate, provided by the Act of 1838, section 63, is excluded, and a liability is thrown on the person deriving the private profit or use to the extent indicated in that section. The legal basis then is clear on which the appellant's case, as made, is to be treated.

It is difficult to entertain a doubt that the property in the case is altogether of a public nature, and is occupied for the public service, or, in the language of section 63 of the Act of 1838, that it is dedicated to or used for public purposes. The passage of the University Act of 1908 was an event of high importance in Ireland, and it is not questioned that it conferred a great public benefit on the whole country. Its general scheme, as is well known, was to establish two new Universities in Ireland—one in Belfast, consisting of the former Queen's College, Belfast, and the new National University, with its seat in Dublin, having as its constituent colleges the then named Queen's College, Cork, Queen's College, Galway, and the new college to be erected in Dublin. That was an Act in which every inhabitant of Ireland was and is interested, and the advantages bestowed by it are not confined to a single class or district, but affect the whole population. Under the Act a new Charter has been granted to the

(1) I. R. 2 C. L. 577.
(2) [1899] 2 I. R. 214.
(3) [1897] 2 I. R. 516.
(4) [1904] 2 I. R. 429.
(5) 11 H. L. C. 443.

Appeal. 1912. — UNIV. COLL., CORK *v.* COMMR. OF VALUATION. — The Lord Chancellor.

former Queen's College, Cork, giving it its present name, "The University College, Cork." The property and buildings, previously held by the Commissioners of Public Works for the purposes of the Queen's College, Cork, are vested in the University College, Cork. By the Act of 1908, the Charter given to it, and the statute made for it by the Dublin Commissioners appointed under the Act, elaborate and carefully conceived provisions have been made for the government and management of the College, and the fulfilment of its great public functions. A permanent annual endowment of £20,000 is granted to the College out of moneys provided by Parliament; and for the purpose of improving the necessary buildings and equipment, and for the purchasing of lands, the sum of £14,000 was also charged upon public moneys, to be applied for these purposes, on the approval of the Treasury. Under section 7 (4) of the Act provision is made that all the moneys shall be applied by the College Governing Body, subject to the limitation stated in the section, in accordance with its Charter and statutes, and further moneys may be provided by Parliament in virtue of section 7 (7) of the Act. Power is given by the Charter, clause 14, and by the College Statute, chapter 27, to the Governing Body to demand and receive such fees as the Governing Body may appoint. It is, however, by clause 15 of the Charter provided in terms that, except as previously stated in the Charter, and except by way of prize, reward, special grant, or remuneration for services rendered, or to be rendered in the past, present, or future respectively, the College shall not make any gift, division, or bonus in money unto or between any of its members. I have examined the preceding clauses of the Charter, and I can find no authority for expenditure except that implied as necessary for the execution of the "Powers of the College," specified in clause 3. Clause 9, so far as it relates to recommendations for scholarships and other prizes, is only ancillary to clause 3. And then there is the provision in clause 12 (2) declaring that "the duties and remuneration of the several Professorships and Lectureships shall be determined by the statutes of the College. . . ." Passing, accordingly, to chapter 16 of the statute made by the Dublin Commissioners, I find the provisions relating to "Professorships and Scholarships: their stipends"; and while in section 1 of the chapter the salaries

in each case are stated, in section 2 it is provided that no share of fees shall be allotted to any Professor or Lecturer, and the sums named in section 1 should include the whole remuneration. There are two exceptions, however, provided for, subject to which the provision just mentioned is to have absolute effect. The first is to be found in a proviso to section 1. It runs: "Provided that any Professor or Lecturer who delivers a course of lectures in subjects not included in the programme of studies for degrees, diplomas, or certificates of the University, or for ordinary medical, surgical, or dental qualifications, or for a diploma or certificate of the College, may, with the consent of the Governing Body, and on the recommendation of the Academic Council and of the President, be permitted to receive three-fourths of the fees paid for such course." The other is contained in section 3, providing that each Professor, Lecturer, and other officer who held office in the College on 30th September, 1908, being the day appointed in the Order of His Excellency of 26th September, 1908, for the coming into operation of certain sections of the Act, is entitled, according to the election which he made under the statute on the 15th May, 1909, to receive—(*a*) the salary set down for his office in this chapter without share of fees and without additional remuneration for examining student members of the College at University Examinations; or (*b*) the salary which he at present enjoys in the College, together with a sum to be paid by the College equivalent to the fees paid by the students for his courses; and such further sum for examining students, to be paid by the University, as the University shall appoint. Section 4 provides for a limited time for making the election just indicated, and section 5 enacts that the stipends of the President, and of the Professors and Lecturers, and of the officers, shall be paid out of the income of the College granted by Parliament, and shall be charged thereon. The statute containing these provisions was presented to both Houses of Parliament pursuant to section 5 (1) of the Irish Universities Act, 1908. Under section 5 (2) on an address presented from either House of Parliament praying His Majesty to disallow the statute, or any part thereof, it is provided that no further proceedings shall be taken on the statute, or on the part thereof to which the address relates. No address was presented to His

Appeal.
1912.
UNIV. COLL., CORK
v.
COMMR. OF VALUATION.
The Lord Chancellor.

Majesty by either House of Parliament, so that the subsisting statute fixing and regulating the payments to the President, Professors, Lecturers, and other officers, must be taken to have the full approval of Parliament, to which was reserved by the section quoted the fullest power to have the statute cancelled, if the statute in any way violated the purposes and will of Parliament. I have traced these provisions owing to the importance attached to the receipt of fees paid by the students, and in the face of what I have pointed out it is impossible to contend that there is, or could be, any disposition of the fees, or of any moneys of the College, amounting to a private profit or use on the part of anyone, and the whole management of them is regulated by the Charter and the precise provisions of the College statute, bearing, as I say in all substance it does, the imprimatur of both Houses of Parliament. In support, too, of the inference arising from which, as I have stated, is the contrast between the present state of things and that existing before the passing of the Act of 1908, prior to that Act, under section 13 of 8 & 9 Vict. c. 66 (the Queen's Colleges, Ireland, Act), regulating the Queen's College, Cork, it was lawful for the Professors, in addition to their stipends, to demand and receive from the students in the College such reasonable fees for attendance on their lectures as should from time to time be provided by the Statutes, Rules, and Ordinances to be made by Her late Majesty Queen Victoria, her heirs and successors. In the present case it must be accepted that where portion of the fees may be paid to or received by the Professors or Lecturers, the cases are ones in which the Professors or Lecturers would otherwise receive no remuneration for the additional services rendered by them, or in which the Professors, Lecturers, or officers in office on 30th September, 1908, were given their choice to take remuneration in the shape of the new salaries, or to take instead their old salaries, together with a sum equivalent to their fees. There is no private profit, then, in the sense of section 63 of the Act of 1838, but a specified method of paying for the services rendered by the Professors, Lecturers, and other officials, which must be taken to have the undoubted approval of Parliament itself. As a further proof of the control of Parliament, there is the necessity, on the part of the College, under section 7 (6) of the Act to prepare annually,

in such form as the Treasury directs, accounts of all receipts and expenditure, capital and income under their control. These accounts—that for the year 1911, produced before us, shows the college fees and fines, and the class fees, included amongst the college receipts—have to be sent for audit by the Controller and Auditor-General, and they in turn are obliged by the Act to lay the said accounts, with their reports thereon, before the House of Commons. The importance of the provision is manifest, and I agree with Mr. Justice Madden's opinion upon it when he says that he regards it as a declaration by the Legislature that the revenues of the college are applicable exclusively to purposes of a public character.

I cannot pass from the financial aspect of the case without adverting to section 8 of the Act, under which the surplus of the fee fund mentioned in section 122 (2) of the Local Government Act is withdrawn from the purpose there indicated, and was made available for the new Universities and the constituent colleges of the new University at Dublin, as the Lord Lieutenant in Council may direct. The document first referred to, namely, the accounts of receipts and expenditure of the Universities and Colleges (including the fee-fund grant) for the year ended 31st March, 1911, together with the report of the Controller and Auditor-General, show that the University College, Cork, has got its share of that surplus fee fund under the Order of the Lord Lieutenant in Council. The question at once arises, Is it conceivable that the Legislature would ever have withdrawn money devoted to a public purpose under the Local Government Act, except to promote another and at least equally important purpose conceived by Parliament, in the establishment of the great system of University Education, in which the University College, Cork, is playing so beneficial a part?

The University College is open to all classes of people without distinction of rank, creed, or sex, and without limitation of locality from which students may come. To suggest that in these circumstances it is not open to the public generally, because it is not possible for all persons to comply with the requirements of the College for the matriculation, and attendance at the lectures, either by inability to pay the requisite fees or to pass the necessary

Appeal. 1912.

UNIV. COLL., CORK v. COMMR. OF VALUATION.

The Lord Chancellor.

entrance examination, is, in my opinion, to disregard the general experience, and any other course would be against the nature of things in the case of great institutions like the new Universities, with their Colleges, established to advance and disseminate knowledge and to promote higher education amongst all classes of the people, capable, according to the ordinary conditions, of receiving it.

The whole country is interested in the work of these Universities and Colleges, and though there will be, and necessarily, a limitation in the number of persons who can avail themselves of their advantages, none the less will the general benefit resulting from them extend to all sections of the people. Then, too, we must look at the remarkable provisions made for extending the benefits of the Universities and the Colleges to all classes in the country. I do not think that anything is more notable in the Act than the provisions made in it in that direction. By section 2 (4) provision can be made, and, as I understand, has been made, by the Charters of the new Universities, under which they are enabled to give to matriculated students of the Universities, pursuing a course of study in a "recognized College in Ireland, under teachers recognized by the Governing Body," the benefit of any privileges of matriculated students of the Universities who are pursuing a course of study at the Universities, including the right to obtain a University Degree. We must look at section 10, enabling the Intermediate Education Board for Ireland, out of their funds to assist students or intending students of any University in Ireland, by means of exhibitions, scholarships, bursaries, payments of fees or otherwise. And then, above all, there is the provision in section 10 (2) enabling the Counties and County Boroughs in Ireland, by the like means of exhibitions, and so forth, to assist, at any University in Ireland, students who are ordinary residents in the county or borough. The councils are also authorized to place any sums at the disposal of any University in Ireland, or any College thereof, to be applied for any educational purposes which the Council may consider will benefit their county or borough, being purposes for which moneys provided by Parliament under the Act may be applied. These facts can leave no doubt upon the character of these Universities and

Colleges, and the purpose of extending their benefits to persons of every class in the country, and the provisions just noted are conclusive evidence of the design to provide honourable assistance in money to the students requiring it, and competent to take full advantage of the higher studies. There is therefore no limitation in this case, as I have said, to any class or section of the people, to any sex, or to any locality, and the fact is a conclusive badge of the public nature of the Universities and the constituent Colleges. I do not pursue this part of the case further, and I am content to refer to the other matters relative to the subject, relied on in the Divisional Court: the provisions for the constitution of the governing body, the inclusion of public men therein, the power of Parliament—or rather of either House of Parliament—over the statutes of the College, and the public control thereby preserved. Finally, there is the fact that the Visitor of College is His Majesty the King.

The Attorney-General in opening the appeal made it his chief argument that, even on the assumption of the public character, purposes, and nature of the University College, Cork, the property in question is not within the exemption clause in section 63 of the Act of 1838. He has stated that the contention presented by him was never put forward on any previous occasion in the course of any of the numerous cases decided upon that section. The argument, as I understood it, is based on the nature of the properties with which "building, land or hereditament, dedicated to or used for public purposes," are collocated in the classification set out in the proviso for exemption in the section. He contends that at least some of these other properties are plainly referable to the poorer classes, and that University College, Cork, having regard to its general character and purposes, could not possibly be regarded as within the denomination of building, land, or hereditament, dedicated to or used for purposes as mentioned in the section. I have fully considered the argument used by the Attorney-General in that respect, and I have studied the section to see on what view of it he founded his construction of it as presented to the Court.

The principle of the *ejusdem generis* construction can, I think, have no application to the case. In addition to the inclusion of

Appeal. 1912.

UNIV. COLL., CORK *v.* COMMR. OF VALUATION.

The Lord Chancellor.

buildings dedicated to the poor, there are other descriptions of property included in which no such implication could be made at all. The very first class enumerated are buildings exclusively devoted to religious worship. In these there can be no distinction between the rich and the poor, and *a fortiori* does this observation apply in the case of burial-grounds and cemeteries, which are included amongst the properties exempted. The proximity of the words relating to lands, buildings, and tenements, dedicated to or used for public purposes, to the fourth class of property mentioned, namely, "infirmary, hospital, charity school, or other building used exclusively for charitable purposes," was relied on by the Attorney-General, as if that circumstance gave a key to the interpretation of the later denomination. Even adopting the construction placed by the Attorney-General on the words just quoted, I find it impossible to accept that suggestion, and there is nothing, in my opinion, in that circumstance or otherwise in the section, to deprive the words relating to buildings, lands, and hereditaments, dedicated to or used for public purposes, of their *prima facie* and natural meaning. The words appear to me to have been used by Parliament in an unqualified sense. Further, there was no limitation provided for in the new words to be found in section 2, of the Act, of 1854, and these words themselves, which we know describe the same class of hereditaments, and tenements as in section 63 of the Act of 1838, are a striking reply to the Attorney-General's argument. But there is the powerful answer to the Attorney-General arising from the fact of the decisions in *The Londonderry Bridge Case* (1), *The Sligo Harbour Case* (2), *The Belfast Harbour Case* (3), and *The Pembroke Council Case* (4). The decisions made by high authorities in these cases would have been impossible if the construction now sought to be placed on section 63 of the Act of 1838 had any real foundation for it. None of them was a case dealing with property in any way limited to the poor. *The Sligo Harbour Case* (2), and *The Belfast Harbour Case* (3), were scarcely in any direct sense concerned with the poor, and in both cases

(1) I. R. 2 C. L. 577.
(2) [1899] 2 I. R. 214.
(3) [1897] 2 I. R. 516.
(4) [1904] 2 I. R. 429.

the exemption under section 63 was declared—and in *The Sligo Case* (1) by this Court—as applicable to the properties then in discussion. I have already dealt with the question of the receipt by the College of the students' fees. Finally, the Attorney-General relied on the fact that certain of the graduates and certain of the students became, under clause 5 of the Charter, members of the College, and form part of the body corporate. Thereby, he said, they become joint-owners with the other members of the Corporation of the College property. Having regard to section 7 (4) of the Act, to clause 15 of the Charter, and the provisions of the College statute, giving the application of the moneys to the Governing Body, the Attorney-General must have been alluding to the property in the buildings and property transferred from the Commissioners of Public Works in Ireland to the College under section 14 (4) of the Act. However that may be, I do not think the argument is one which the Court could possibly accept. The members of the Corporation acquire no private profit and have no private use of the property or funds of the College. Both one and the other are subject to the provisions of the Act, the Charter, and the College statute relating to them; and all are dedicated to the public purposes of the College. The members of the body corporate have, as such, no beneficial interest whatever in them, and the excluding words of the exemption clause in section 63 of the Act of 1838 could have no application to the facts existing in this case.

I heard with much interest the powerful argument of Mr. Ronan, upon the question discussed by him regarding the exclusively charitable purposes and use of the University College, and to his exposition of the law in the case. His chief reliance naturally was on *Pemsel's Case* (2). Remembering, however, the course of the whole argument, the question of charitable purpose was not, I think, as fully discussed as it would be desirable it should be, in order to lead the Court to make a decision on the subject. Circumstances may easily arise in which the Court would have to pronounce a judgment on the points raised; but it would not be a prudent course to take in the present

(1) [1899] 2 I. R. 214. (2) [1891] A. C. 531.

Appeal. 1912. Univ. Coll., Cork v. Commr. of Valuation.

situation, when, on the contentions presented by the appellant, the Court has come to the conclusion that the appeal has, in all substance, wholly failed.

We think, accordingly, that the order of the Divisional Court should be affirmed with costs.

Holmes, L.J. :—

This litigation was originated in the High Court by a case stated by the Recorder of Cork, pursuant to 23 Vict. c. 4, section 10, submitting for the opinion of the King's Bench Division the following question :—"Are certain hereditaments and premises, the property of University College, Cork, of a public nature within the meaning of 15 & 16 Vict. c. 63, and 17 & 18 Vict. c. 2, and was the Recorder right in directing the Commissioner of Valuation to distinguish the same in his revised list of valuation as being hereditaments and premises of a public nature, and used exclusively for public purposes?" Although this was the only question on which the Court was asked by the Recorder to give its opinion, another question was argued with great zeal by counsel for the College, who for some reason unknown to me were more desirous to have it decided in their favour than that on which they had obtained the judgments of the Recorder and of the King's Bench Division.

Concurring as I do in those judgments, I need hardly say that I shall confine myself to the subject which the Court has been asked to consider; and, although I may mention the nature of the other question, I shall only do so for the purpose of stating my reason for declining to discuss it. Statutes relating to the valuation of rateable property in Ireland have been passed from time to time, and a Commissioner to conduct and superintend such valuation has been appointed pursuant to those statutes by the Lord Lieutenant, but of their many provisions it is, I think, only necessary in considering this appeal to refer to sections 15 and 16 of 15 & 16 Vict. c. 63, and section 2 of 17 Vict. c. 8. The first-mentioned section enacts that "in making out the lists or tables of valuation, the Commissioner shall distinguish all hereditaments and tenements, or portions of the same, of a public nature, or used for

charitable purposes, or for the purposes of science, literature, and the fine arts, as specified in 6 & 7 Vict. c. 36, and the value of the same shall be deducted from the gross amount of the valuation of the hereditaments and tenements comprised in each such list or table; and all such hereditaments or tenements, or portions of the same, so distinguished and deducted, shall, for the purpose of this Act be deemed exempt from all assessment whatsoever, so long as they shall continue to be of a public nature, or used for the purposes aforesaid."

Section 16 enacts that "for the purposes of such valuation no hereditaments or tenements, or portions of the same, shall be deemed to be of a public nature, or used for such charitable, scientific, or other purposes as hereinbefore specified within the meaning of this Act, unless such hereditaments or tenements, or portions of the same respectively, shall be altogether of a public nature, or used exclusively for such charitable, scientific, or other purposes aforesaid."

Section 2 of 17 Vict. c. 8 follows the 15th section of the earlier Act already quoted *verbatim* down to the words "6 & 7 Vict. c. 36," after which there is a slight deviation in the language, which runs—"And all such hereditaments or tenements, or portions of the same, so distinguished, shall, so long as they shall continue to be of a public nature, and occupied for the public service, or used for the purposes aforesaid, be deemed exempt from all assessment, for the relief of the destitute poor in Ireland, and for grand jury and county rates."

It will be noticed that there are two differences between the sections—(1) the words "and occupied for the public service" following the words "so long as they shall continue to be of a public nature"; and (2), the words, "for the relief of the destitute poor in Ireland, and for grand jury and county rates," after the words "exempt from all assessment."

The Acts to which I have referred relate to the valuation of hereditaments and premises for the purpose of rating, but they impose no rates and taxes. The authority for imposing the assessments for the relief of the destitute poor in Ireland, and for grand jury and county rates referred to in section 2 of 17 Vict. c. 8, must be looked for in other statutes; and it is reasonable to expect that

Appeal. 1912.

UNIV. COLL., CORK v. COMMR. OF VALUATION.

Holmes, L.J.

the provisions relating to exemption from liability to be found in each class of legislation should harmonize. Accordingly, when the exemptions in the Valuation Acts have been under consideration in an Irish tribunal, the 63rd section of 1 & 2 Vict. c. 56, which declares what hereditaments are rateable for poor-rate, has always been supposed to assist in their construction. For example, on the only occasion on which a question precisely similar to the present was argued and decided in this Court, three of its four Judges, then present, referred to this section as throwing light upon what is meant by premises of a public nature in the Valuation Code.

I shall, therefore, conclude this portion of my judgment by quoting the final proviso of section 63—"Provided also that no church, chapel, or other building exclusively dedicated to religious worship, or exclusively used for the education of the poor, nor any burial ground or cemetery, nor any infirmary, hospital, charity school, or other building used exclusively for charitable purposes, nor any building, land, or hereditament dedicated to or used for public purposes, shall be rateable, except where any private profit or use shall be directly derived therefrom, in which case the person deriving such profit or use shall be liable to be rated as an occupier according to the annual value of such profit or use." I may add that by the Grand Jury Amendment Act, 1856, section 2, the hereditaments and premises which were liable to rates for the relief of the destitute poor in Ireland are made liable to the payment of grand jury rates and county cess.

Having thus stated what I regard as the material enactments prescribing the duty of the Commissioner of Valuation relative to premises of a public nature, I proceed to consider, as briefly as I can, whether the hereditaments and premises, the subject of the "Case Stated," are of a public nature.

Queen's College, Cork, was founded by Letters Patent, granted by Queen Victoria, in the manner provided by 8 & 9 Vict. c. 66, a statute the object of which is stated in its opening words to have been "for the better advancement of learning among all classes of Her Majesty's subjects in Ireland."

The site of the College was purchased, and its buildings erected with money advanced, under the provisions of the Act, out of the

Consolidated Fund of the United Kingdom. The premises thus acquired were vested in the Commissioners of Public Works in Ireland in trust for Her Majesty. An annual charge of £7000 was placed on the same fund for the endowment of the President, Vice-President, and Professors of the College, who were also entitled to receive reasonable fees from the students for attendance on their lectures. Statutes, rules, and ordinances for the government and discipline of the college were to be made or approved from time to time by Her Majesty, and laid before both Houses of Parliament by one of the Secretaries of State. Such was the character of Queen's College, Cork, from its foundation down to the year 1908. If it had been necessary to show during this period that its lands and buildings were of a public nature, the facts I have mentioned would have afforded strong grounds to support that proposition; but being vested in trustees for the Sovereign, they were not subject to any kind of assessment in the absence of a special statutory provision rendering them liable.

I understand, however, that the Board of Works made a voluntary payment in aid of the local rates.

The Irish Universities Act, 1908, founded two new Universities in Ireland, having their seats respectively in Dublin and Belfast, and makes Queen's College, Cork, a constituent college of the former. Pursuant to the provisions of this Act a new charter was granted by the late King, dated the 2nd December, 1908, altering the name of Queen's to University College, Cork, and a statute dated the 15th April, 1911, was given for its government by the Dublin Commissioners appointed under the Act.

The effect of the Irish Universities Act, 1908, and the charter and statute that followed, while preserving the continuity of the College, introduced many changes in its constitution which it is unnecessary for me to examine in detail. The most important of them were—

(1) The creation and incorporation of a new governing body and the transfer of the buildings and property theretofore held in trust for the Sovereign from the Commissioners of Public Works in Ireland to the College itself.

(2) An annual sum of £20,000 was to be paid out of moneys

Appeal. 1912.

UNIV. COLL., CORK v. COMMR. OF VALUATION.

Holmes, L.J.

provided by Parliament for the purposes of the College, as well as further sums, not exceeding in the whole £14,000, for purchasing lands and providing additional buildings and equipment.

(3) A provision that while the College may demand and receive such fees as the Governing Body may appoint, it shall not make any gift, division, or bonus unto or between any of its members; nor are fees to be paid directly to the Professors and Lecturers, who are to receive salaries at specified rates.

(4) The obligation on the Governing Body of having its accounts audited every year by the Controller and Auditor-General, and laid with his report before the House of Commons.

Now, if the only description of exempted hereditaments and premises in the statutes of 1838, 1852, and 1854, to which I have referred, was "of a public nature," I should have little doubt that the property with which we are concerned in this appeal comes within this category. The object of the legislation relating to Cork College is stated in the Act of 1845 to be for the better advancement of learning among all classes of the Sovereign's subjects in Ireland. For this purpose the cost of procuring the lands and buildings was provided by the Consolidated Fund, and Parliament votes every year a large revenue, the expenditure of which is audited for the information of the House of Commons by the officer who examines and reports upon all public expenditure. The only other source of income possessed by the College is the fees of students, and what is obtained thereby must be applied to the same purposes as the State Endowment, and no private benefit can be derived therefrom. If the College premises are not of a public nature within the meaning of the Valuation Acts, it seems to me that those descriptive words must be confined to premises occupied for the service of the Crown or the State. But this Court has already declined to thus limit their signification; and if we were to do so, it would have the effect of rendering this class of exemption in the statutes I have referred to unnecessary surplusage, inasmuch as premises of that character would not be liable to taxation if such grounds of exemption had been omitted altogether. The only argument of the appellant against holding the College premises exempt on the ground of their being of a public nature is that a very limited portion of the public can make use of them.

Although, theoretically, the College is open to all ranks and conditions of men, its students are necessarily confined to persons able to pay fees, and preparing for positions and professions which comparatively few can reach. But if premises of a public nature in these Acts include premises other than those occupied for the service of the Crown or the State, it would certainly be consistent with those words as employed in ordinary language to apply them to premises by which only portion of the public is benefited.

These considerations would probably have led me to the same conclusion as that arrived at by the King's Bench Division; but I am relieved from any difficulty by authority which, I hold, binds this Court.

Many cases have been quoted during the argument; but English authority gives no assistance, and I only propose to mention three Irish decisions.

In the *Derry Bridge Case* (1), which was heard by the Exchequer Chamber in this country, it was sought to make the Commissioners, who had, under the authority of an Act of Parliament, built the bridge in that city across the Foyle, liable to pay rates for the bridge. The Commissioners were empowered to erect toll-houses, and to take tolls which were to be applied in payment of money borrowed under the Act, and, subject to such payment, in the creation of a sinking fund for the purpose of ultimately making the bridge toll-free. Although theoretically it might be used by all the subjects of the realm, it as a matter of fact was only beneficial to such of them as were passing into and out of the city of Londonderry, and then only on payment of a toll, yet it was held to be of a public nature and exempted from assessment by the statutes to which I have referred.

The judgment of the Court, which might have been carried to the House of Lords, was acquiesced in; and in 1896 it was followed by the King's Bench Division in *The Belfast Harbour Commissioners* v. *Commissioner of Valuation* (2). In that case, the Commissioner of Valuation included the property of the Belfast Harbour Commissioners in the revised lists of rateable hereditaments, and a Case was stated for the High Court to determine the

(1) I. R. 2 C. L. 577. (2) [1897] 2 I. R. 516.

Appeal. 1912. UNIV. COLL., CORK v. COMMR. OF VALUATION. Holmes, L.J.

question of liability. The Harbour Commissioners, incorporated by certain local Acts, had vested in them the harbour and docks of Belfast, with power to levy tolls and duties, to be used for the benefit of the port and harbour. Of course in that case but a small portion of the public made use of the harbour, and then only at considerable expense, yet O'Brien and Gibson, JJ., the latter with much reluctance, Madden, J., dissenting, held the Court bound by the judgment of the Exchequer Chamber, in the *Derry Bridge Case* (1), to decide that this property was dedicated to or used for public purposes and within the exemption of the Valuation Acts. That case, decided in 1896, led, I have no doubt, to the passing of 60 Vict. c. 17, which gave an appeal from the Divisional Court to this Court in valuation cases like the present.

This was followed in 1898 by *The Commissioner of Valuation* v. *Sligo Harbour Commissioners* (2), substantially similar to that of the Belfast Harbour Commissioners, and brought here on appeal from the Divisional Court, which followed its previous judgment.

Ever since this Court was constituted by the Judicature Act, it has as a rule followed the decisions of the Exchequer Chamber and Court of Chancery Appeal, the jurisdiction of which was transferred to it; and accordingly its four Judges who heard the Sligo Case considered whether the question to be decided therein came within the principle laid down in the *Derry Bridge Case* (1). They all held that it did; but they also applied themselves to forming an independent judgment on the construction of the statutes, with the result that while Lord Ashbourne, FitzGibbon, L.J., and myself agreed with the reasoning and conclusion of the Exchequer Chamber, Walker, L.J., took the view to which Gibson, J., was inclined in *The Belfast Harbour Case* (3). The Lord Justice said that, "if the only question was the construction of the 63rd section of the Act of 1838, I am not prepared to say that the decision in the *Londonderry Bridge Case* (1) was not right, but the subsequent legislation

(1) I. R. 2 C. L. 577.
(2) [1899] 2 I. R. 214.
(3) [1897] 2 I. R. 516.

is progressive." He was of opinion that the words relating to exemption of lands and buildings on the ground of their being public were narrower in the Act of 1852, and still more narrow in that of 1854, meaning therein only premises occupied for the service of the Crown or of the State.

To the three other members of the Court this seemed to be an unreasonable construction of the last Acts; that if this had been intended it would have been carried out in a different way; and that the words in the three statutes ought to be given the same meaning. Speaking for myself, and I think also for the two colleagues who agreed with me, I was considerably influenced in construing the three sections by the words "any building, land, or hereditament dedicated to or used for public purposes," to be found in section 63 of the Act of 1838. I need not, however, discuss further the grounds of the decision. It is enough to say that it was given, that it binds this Court, and that the wit of man cannot distinguish it from the case now under consideration. Indeed, the reasons for holding the property of University College, Cork, of a public nature are far stronger than those that existed in the case of Sligo Harbour.

The other matter which was pressed so vigorously by counsel for the College is that the premises are exempt by reason of their being used exclusively for charitable purposes. We heard a great deal of *Pemsel's Case* (1), and it was hinted that we should be showing some disrespect to that high authority if we were not to say at once that it governed the present case. There is little danger of our not holding, when it is necessary to do so, that the words "charity" and "charitable" in an Act of Parliament *primâ facie* comprise trusts for the advancement of education, but their meaning, like the meaning of many other words, may be modified by the context; and I avoid deciding that the College premises are used for charitable purposes, because that is not the question asked in the Case Stated; and because if it were asked, I should require further consideration before holding that the strictly legal meaning of "charitable" is not to some extent altered by the context in the enactments with which I have been dealing.

(1) [1891] A. C. 531.

Appeal.
1912.

UNIV. COLL., CORK
v.
COMMR. OF VALUATION.

CHERRY, L.J.:—

I concur. After the elaborate judgments that have been delivered by five Judges, in the King's Bench Division and this Court, all arriving at the same conclusion, though by slightly different processes of reasoning, I feel that there is nothing that I can usefully add, except to say that I base my decision mainly upon the provisions of the Irish Universities Act, 1908, and I agree with the view so powerfully expressed by Madden, J., in the Court below, that the terms of section 7 (6) of that Act amount to a legislative declaration that the revenues of the College are applicable exclusively to purposes of a public character. The learned Recorder of Cork was therefore right, in my opinion, in holding that the College premises were altogether of a public nature, and used for public purposes within the meaning of 15 & 16 Vict. c. 63, section 16, and 17 & 18 Vict. c. 8, section 2; and that accordingly they were entitled to be exempted from assessment under those Acts.

Solicitor for the Commissioner of Valuation: *W. G. Towers.*
Solicitor for University College, Cork: *Michael Murphy.*

W. G.

THE KING (CORCORAN) *v.* THE JUSTICES OF WICKLOW (1).

K. B. Div. 1912. Jan. 29. Feb. 1.

Caretaker's agreement—Right to go behind—Alleged collateral agreement—Justices—Summary jurisdiction—Declining jurisdiction—Certiorari—*Landlord and Tenant (Ireland) Act*, 1860 (23 & 24 *Vict. c.* 154), *s.* 86.

The prosecutors, who had been yearly tenants to the National Bank of certain premises, signed an agreement acknowledging that they had been put into possession of the premises by the bank as servants and caretakers, and undertaking to give up possession on one week's notice. They signed at the same time a promissory note payable four months after date for the amount of arrears of rent then due. After the expiration of the four months the bank gave notice requiring possession, and, possession not having been given, issued a summons under section 86 of 23 & 24 Vict. c. 154, requiring the prosecutors to show cause why they should not deliver up possession of the premises to the bank. On the hearing of the summons the prosecutors sought to make the case that the arrangement with the bank was that the caretakers' agreement should be returned if the amount of the promissory note was paid, and that it had been paid. The Justices, however, refused to go behind the written agreement, and made an order for possession.

Held, that the prosecutors were entitled to put forward the case attempted to be made by them; that the Justices by refusing to allow them to put it forward had declined jurisdiction; and that the order of the Justices should be quashed on *certiorari*.

CERTIORARI.

This was an application on behalf of the prosecutors, Michael Corcoran, and Norah Corcoran, his wife, to make absolute a conditional order for a writ of *certiorari* to quash an order made at Bray Petty Sessions, county Wicklow, on a summons issued under section 86 of the Landlord and Tenant (Ireland) Act, 1860, in which the National Bank, Limited, were complainants, and the prosecutors defendants, ordering the defendants to be ejected from the house and premises, Glenallyn House, Trafalgar Road, Greystones, county Wicklow, of which they were alleged to have been put into possession by permission of the complainants as caretakers and servants. The grounds

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and GIBSON, J.

K. B. Div. 1912.

THE KING (CORCORAN) *v.* JUSTICES OF WICKLOW.

set out in the conditional order, so far as material for the purpose of the present report, were:—(*a*) that the prosecutors were not caretakers; (*b*) that a *bonâ fide* question of title having been raised by Michael Corcoran, the Justices refused to hear the same.

The conditional order was granted on a joint affidavit of the prosecutors, which set out the following matters:—

By an agreement in writing, dated the 15th April, 1908, made between Edward Beggs of the one part, and the prosecutors of the other part, the prosecutors agreed to become tenants of Edward Beggs of the premises known as Glenallyn House, Greystones, county Wicklow, for one year from the 1st April, 1908, at the rent of £40, free from rates and taxes and payable quarterly on the 1st July, 1st October, 1st January, and 1st April. The landlord's interest subsequently became vested in the National Bank, Limited (hereinafter called "the bank"), and the prosecutors became their tenants on the same terms. They remained in possession under the agreement up to the 24th March, 1911, the bank accepting rent annually, instead of quarterly.

On the 24th March, 1911, Michael Corcoran attended by arrangement at the head office of the bank, and went into the rent account with Mr. Ashe, the agent, and the bank officials. He signed an account drawn up by the bank, showing that upon the 1st April, 1911, there would be a sum of £47 14*s.* 10*d.* due for rent over and above deduction for rates. He was threatened with ejectment proceedings, and signed a joint and several promissory note, intended to be signed also by his wife, for the said sum of £47 14*s.* 10*d.*, payable four months after date. He also signed a caretakers' agreement, which was in the following form:—

"GREYSTONES, Co. WICKLOW,

"24*th March*, 1911.

"We do hereby acknowledge that the National Bank, Limited, have put us into possession of the house and premises known as Glenallyn House, Trafalgar Road, Greystones, county Wicklow, as servants and caretakers, and, on their giving us one week's notice of discharge from their employment, we undertake to give up possession of the said house and premises."

Michael Corcoran in the affidavit alleged that his contract, however, with the bank was that upon his taking up the note he was to be returned the caretakers' agreement, and the terms of the original tenancy were to be again in force.

Mrs. Norah Corcoran stated in the affidavit that on the evening of the 24th March Mr. Ashe called at Glenallyn House, and stated that if she signed a document put before her (the caretakers' agreement), she and her husband would be quite safe in the house, and have time to pay the rent, and that she then signed the document and the promissory note.

On the 1st August, 1911, Michael Corcoran, paid the bank £20 in reduction of the promissory note, and in the month of September he attended at the bank, and tendered the balance due, less £5 1*s.* 4*d.*, the amount of rates paid by him and of some necessary repairs. The bank accepted the amount tendered, but refused to give up the note and the caretakers' agreement.

On the 29th August, 1911, notice in writing had been served by the bank on the prosecutors, requiring them to give up possession of the premises on the 5th September, and on the 2nd October a summons was issued and served on the prosecutors, requiring them to show cause why they should not deliver up possession to the bank, or their agent or receiver. The summons came on for hearing at Bray Petty Sessions on the 7th October, 1911. Michael Corcoran swore, in the affidavit of the prosecutors referred to, that he attended Court on that day, and stated that there was a question of title to be decided, and endeavoured to explain to the magistrates the agreement which that bank had made with him, that he should be returned the caretakers' agreement, provided payment of the amount secured by the promissory note was made; but the magistrates who adjudicated in the case informed him that they had the written agreement before them, and that they would not go behind it, and they refused to allow him to discuss the matter further, and made the order now sought to be quashed.

On the 20th October, 1911, the prosecutors were evicted from the premises under a warrant issued in pursuance of the order of the 7th October.

In affidavits made by Mr. James Ashe, the agent and receiver

K. B. Div. 1912.

THE KING (CORCORAN) v. JUSTICES OF WICKLOW.

for the bank over the premises in question, and by the manager of the College Green office of the bank, filed on behalf of the bank, by way of cause against making the conditional order absolute, it was denied that there was any arrangement such as alleged—that on the taking up of the note the caretakers' agreement was to be given back to the prosecutors, or the original tenancy revived; that the arrangement was that if the prosecutors would surrender the tenancy, the bank would allow them into the premises as caretakers upon signing a caretakers' agreement, and that they would be allowed to remain during the currency of the promissory note; and that the prosecutors accordingly surrendered the premises to the agent, and signed the caretakers' agreement and the promissory note.

A. M. Sullivan, K.C. (with him, *Fforde*), for the prosecutors:—

The caretakers' agreement was signed by the prosecutors merely as a security for the payment of the promissory note. They were entitled to make this case before the Justices, and the Justices were wrong in refusing to allow such case to be made, and holding that they would not go behind the written agreement. A *bona fide* question of title was raised which ousted the jurisdiction of the Justices. [He referred to *Deasy* v. *Donoghue* (1); *Rex* (*Donnelly and others*) v. *Justices of Kerry* (2); *The Queen* v. *Marsham* (3); *Scott* v. *Baring* (4); *Rex* v. *West Riding of Yorkshire Justices* (5).]

Swayne, for the National Bank:—

Even assuming that the prosecutors' account of the transaction is correct, the condition on which it is alleged that the caretakers' agreement was to be returned was not performed, since the note was not paid at maturity. [Palles, C.B.: Where such a condition is attached, is it a caretakers' agreement at all?] Yes. The prosecutors became caretakers, with a subsidiary agreement that they were not to be put out for four months; this created no

(1) 2 New Ir. Jur. Rep. 174.
(2) *Ibid.* 175.
(3) [1892] 1 Q. B. 371.
(4) 64 L. J. M. C. 200.
(5) [1910] 2 K. B. 192.

tenancy, though it might have given rise to an action for damages if the prosecutors had been put out in breach of the subsidiary agreement. The fact that the prosecutors allege an agreement for a tenancy does not oust the jurisdiction of the Justices: *The Queen* v. *Justices of Tipperary* (1). The prosecutors are estopped by the caretakers' agreement: *Kean* v. *Robinson* (2). The prosecutors will gain no benefit from the writ of *certiorari* in this case, since it will not restore them to possession; therefore, the Court in the exercise of its discretion should refuse the writ: *The King* (*M'Swiggan*) v. *Justices of Londonderry* (3).

Eforde, in reply, referred to *The King* (*De Vesci*) v. *Justices of Queen's County* (4).

LORD O'BRIEN, L.C.J.:—

In this case we have considered every point that was made very carefully. There is one point I cannot get over. Michael Corcoran states, in the joint affidavit made by himself and his wife—"I attended Court . . . and stated that there was a question of title to be decided, and endeavoured to explain to the magistrates the agreement which the bank had made with me that I should be returned the caretakers' agreement, provided payment of the amount secured by the promissory note was made, but the magistrates who adjudicated in the case informed me they had the written agreement before them, and that they would not go behind it, and they refused to allow me to discuss the matter further." That is a very distinct, categorical statement. I have read the affidavits filed on behalf of the bank, and read them more than once, and I do not find that statement contradicted. On this ground, therefore, I am of opinion that the magistrates declined jurisdiction. I think it was possible, in point of law, for the defendants to have made the case of a collateral agreement of the description referred to, and that such agreement, if established, would have been a good answer to the proceedings. The Justices by refusing to allow the defendants to go into this matter were declining jurisdiction.

(1) 12 L. R. Ir. 393.
(2) [1910] 2 I. R. 306.
(3) [1905] 2 I. R. 318.
(4) [1908] 2 I. R. 285.

K. B. Div. 1912.

THE KING (CORCORAN) *v.* JUSTICES OF WICKLOW.

Lord O'Brien, L.C.J.

I confine my judgment to this point. I am careful to make no reflections either on the magistrates or on the bank. It is stated on behalf of the bank that they treated the defendants with great forbearance. I give no opinion as to this, nor, on the other hand, do I make any reflection whatever on the bank. If the defendant had been allowed to go into his case, he might have succeeded, or, on the other hand, he might have utterly broken down.

We are all of opinion the *certiorari* should be granted.

PALLES, C.B. :—

I do not think it necessary to add anything to what the Lord Chief Justice has said. There are a number of questions which might be argued in the case, but I do not think it necessary to consider them. The magistrates seem to have thought that the signature of this caretakers' agreement having been admitted precluded the parties from going into any other question. I am, however, quite clear that it was open to the prosecutors here to show that that agreement to hold the premises as caretakers was part only of one entire agreement, and that another part was that it should not be operative until the expiration of four months, and then only upon a contingency. I entertain the strongest opinion that if this were the true nature of the agreement, the jurisdiction of the magistrates would have been ousted, because the case would not have been within the 86th section of the Landlord and Tenant (Ireland) Act, 1860. It is not, however, necessary to consider this, although, as I have said, I have formed a strong opinion on it. The magistrates declined jurisdiction by refusing to allow the defendants to put forward a defence they were entitled to put forward, and which, in my opinion, would have been a good legal defence; and on this ground I think that the *certiorari* should go.

GIBSON, J. :—

I have some doubt whether the question of title was brought before the magistrates in such a way as to enable them to appreciate it. We can only have regard to the proceedings and evidence before them.

I do not, however, disagree with the Lord Chief Justice and Lord Chief Baron, that on the evidence the magistrates may be regarded as having declined to allow the defendant to make any case which would be inconsistent with the terms of the caretakers' agreement, and the case, therefore, may come within *The Queen* v. *Marsham* (1). On this view the decision of the magistrates amounted to a declining of jurisdiction; they violated the rules which govern our judicial proceedings, and, accordingly, the *certiorari* must go.

Like the Lord Chief Justice, I express no adverse opinion of the conduct of the magistrates, who were in a position of great difficulty, dealing with a case where a litigant in person was unable intelligibly to present his defence; and I am sure that the bank did not intend to act harshly.

Solicitors for the prosecutors: *Brown & M'Cann.*
Solicitor for the National Bank, Ltd.: *William H. Dunne.*

J. G. T.

(1) [1892] 1 Q. B. 371.

K. B. Div.
1911.

Nov. 9, 10, 23.

TIMOTHY GALLIVAN *v.* KILLARNEY URBAN DISTRICT COUNCIL (1).

(1911. No. 3130.)

Building contract—Penalty for non-completion within contract time—Delay caused by extra works—Final certificate of engineer—Jurisdiction of engineer to determine the exclusion of penalties.

A building contract, entered into by G. for the erection of artisans' cottages for an Urban District Council, contained the following conditions and provisions, viz.: That, in consideration of the payment of the contract price by instalments, payable on the certificate of the Council's engineer, the contractor should within one week from the signing of the contract begin, and within nine months from that date complete the contract works, unless delayed by strikes or lock-outs: that the contractor should carry out all necessary works and complete all works specified in the plans, &c., annexed to the contract, or implied or incidental thereto, or to be thereafter specified or required by explanatory instructions and drawings, being in conformity with the original specifications, &c., and such additional instructions and drawings not being so in conformity with the said original specifications, &c., as should from time to time during the progress of the contract work be required by the Council's engineer, subject, in case of non-completion within the contract time, to forfeiture out of the money due to the contractor of a sum of £5 per week for every week elapsing after the completion of the contract time: that it should be lawful for the Council's engineer, or the Council by written instructions, to make alterations and deviations, and to supply omissions in or to the original specifications, &c., and that such alterations, &c., should not vacate the contract but should be determined as thereby provided, and the value thereof deducted from or added to the contract price: and that the decision of the Council's engineer "with respect to the amount, state, and condition of the works actually executed, and any other question that might arise concerning the construction of the plans, sections, elevations, drawings, and specifications and contract, and the execution of the works included therein, or in anywise relating thereto, shall be final and legally binding and without appeal.

The contract works were, in fact, not completed within the contract time; but certain extra works had been ordered by the Council, and were executed by

(1) Before GIBSON, MADDEN, and BOYD, JJ.

the contractor. The Council's engineer having from time to time given certificates for the payment of the instalments of the contract price, by his final certificate awarded a sum in respect of extra works, but in that certificate did not refer to or make any deduction in respect of penalties for non-completion within the contract time. In an action by G. for the recovery of portion of the contract price from the Council, the Council pleaded that penalties for non-completion within the contract time had arisen, and that the same should be deducted from the money due to the plaintiff, who in reply pleaded that the delay in completion was caused by the extras ordered and executed, and further, that by reason of the final certificate of their engineer, the defendants were estopped from making any claim in respect of penalties. The jury found that there was no waiver of the right to penalties by the defendants, and assessed damages for delay at £30.

Held, by Gibson, Madden, and Boyd, JJ., that the jurisdiction conferred upon the Council's engineer by the contract did not extend to his determining whether the penalty clause in the contract was or was not excluded by the order for, and execution of, the extras.

Held, by Gibson and Madden, JJ. (Boyd, J., *dissentiente*), that as it appeared from the report of the learned Judge at the trial, and from the course of the trial, that the plaintiff had been prevented from completing within the contract time by the extra works ordered, the penalty clause of the contract was extinguished, and the plaintiff was entitled to judgment on his claim.

Held, by Boyd, J., that upon its true construction the contract was one whereby the plaintiff contracted to complete not only the original works contracted for, but also the extra works ordered, within the contract time, and that the defendants were entitled to deduct the penalties, which amounted to £75.

MOTION to set aside the judgment entered for the defendants at the trial, and in lieu thereof to enter judgment for the plaintiff, or, in the alternative, for a new trial.

The action was tried before Lord Justice Cherry and a common jury of the county of Kerry at the Summer Assizes, 1911. The plaintiff, a builder and contractor, by his statement of claim claimed the sum of £309 4*s.* 5*d.* for materials supplied, work done, services rendered to, and money paid to the use of the defendants at their request. In paragraph 1 of his statement of claim the plaintiff claimed as to £301 10*s.* of the amount claimed that that sum was due for work done, materials supplied, and services rendered at the defendants' request in erecting artisans' dwellings, and was due on foot of a contract between him and the defendants

K. B. Div. 1911.

GALLIVAN v. KILLARNEY U. D. C.

dated the 4th February, 1909, and that £7 14*s.* 5*d.* was due as interest upon money due by the defendants to him, and forborne at their request, and by way of damages. In paragraph 2, the plaintiff in the alternative claimed that £70, portion of the above sum of £301 10*s.*, was due on foot of a paying order for £70, dated 29th July, 1910, given by the defendants to him in substitution for a paying order for £300, and that the said order for £70 had been dishonoured on presentation, and notice of the dishonour of the same had been given to the defendants, and that the above-mentioned sum of £7 14*s.* 5*d.* was due as interest, by reason of such dishonour, and was charged by way of damages. The residue of the amount claimed, namely, £231 10*s.*, was claimed as due on foot of the final certificate of the defendants' engineer, dated the 25th August, 1910.

The defendants by their defence, in addition to traversing the statements in the plaintiff's claim, pleaded that in so far as their engineer had certified, his certificate was no bar to their claim for deductions, set-off, or damages, and that in so far as the certificate purported to be such bar, it was beyond the scope of the authority of the engineer. The defendants further pleaded that under the contract of the 4th February, 1909, the plaintiff was subjected to the following conditions, *i.e.* to commence the contract work within one week of the 24th February, 1909, to complete the work within nine months from that date, and upon default of such completion to forfeit for every week after the expiration of the contract time the sum of £5 per week out of the moneys that might be due to him; and that the contract works were not completed until the 24th of March, 1910. The defendants counterclaimed to have the contract rectified, as being obscure, so as to read as follows:—"The contractor hereby covenants and agrees with the Council that he shall and will within one week from the signing hereof begin the work for the erection of the said houses, and shall and will complete the works within nine months from that date"; and pleaded that by reason of the non-completion of the works within the contract time, they were entitled to deduct the sum of £5 for every week elapsing after the end of the period of nine months, and in the alternative that they were entitled to damages for the non-completion of the

work by the plaintiff within a reasonable time. They lodged £235 in Court.

The plaintiff by his reply pleaded that so far as the contract was not completed within the contract time the delay in completion was caused by the ordering of extra works, and by the interference of the defendants' engineer; that by reason of the alleged matters the delay in completion was not unreasonable, and that the defendants were estopped by their conduct from relying on the same and enforcing the penalties or setting off or deducting the same from or against the plaintiff's claim; and further, that in so far as, if at all, any delay occurred the same and the penalties therefor were condoned by the defendants.

The following is the text of the material portions of Lord Justice Cherry's notes:—

"There was no substantial dispute on any question of fact, and the questions at issue mainly turned upon the construction of the contract. . . . Plaintiff, examined by Mr. Lynch, K.C., proved the contract for the erection of thirteen artisans' cottages for the sum of £2345 0*s.* 6*d.* 'The building actually began before the contract was signed. Hickson, the defendants' engineer, issued certificates from time to time as follows:—1st certificate, 5th March, 1909, £270; 2nd, 8th April, 1909, £270; 3rd, 7th May, 1909, £270; 4th, 11th June, 1909, £270; 5th, 7th September, 1909, £270; 6th, 26th November, 1909, £270; 7th, 4th March, 1910, £300; 8th and final, 25th August, 1910, £231 10*s.* The paying order for the £300 was issued under the certificate of the 4th March, 1910; this was afterwards changed to two orders for £230 and £70, the first of which was cashed, but the second was not. This latter order for £70, dated the 29th July, was never paid.—Cross-examined by Serjeant Moriarty, K.C.: No complaints were made to me personally, but they were made to my foreman and communicated to me. There was a resolution passed by the Council complaining of the progress of the work.' [Resolution of the 5th November, 1909, read.] 'I was written to about that on the 18th of March, 1910; I attended with my solicitor, Mr. Macartie, before the Council. Mr. Macartie pressed the

K. B. Div. 1911. GALLIVAN v. KILLARNEY U. D.C.

Council to take over the cottages.' [Resolution of the 18th of March, 1910, read.] 'I was detained by the extra work ordered; that is why I was late in completing the contract. £20 11*s.* was allowed by the final certificate for extras. I thought that there was an allowance of extra time for bad weather in the contract, and I was prevented from finishing the work in time by bad weather—snow and frost. The extras also delayed me. I said nothing about the weather or the extras at the meeting of the Council on 18th March.

"James Gallivan, second witness for the plaintiff—'I am the son of the plaintiff, and acted as paymaster for my father in erecting the cottages. I also carried on correspondence for him. During the progress of the work Mr. Hickson altered the specifications in several particulars. Concrete was substituted for cut stone in the curbing of the footpaths; the water-table was to be paved; trap-doors were required in the ceilings, and concrete steps to the houses, which were not in the original specifications, and the gables were required to be cemented. He gave my father verbal orders for these alterations; I am not aware that there were written orders. In one case, for iron gates instead of wooden ones, he did give a written order. [Order not produced.]

"The plaintiff's case closed. Serjeant Moriarty stated the defendants' case. He admitted the plaintiff's claim for £301, *i.e.*, £231 balance due on contract, and £70 on paying order dishonoured. He disputed the claim for interest. He claimed as a set-off or deduction £75 for fifteen weeks delay in the completion of the contract at £5 per week. He asked for a direction for the defendants, relying upon *Jones* v. *St. John's College, Oxford* (1), *Law* v. *Local Board of Redditch* (2). I refused a direction at that stage, and he then addressed the jury.

"George Hickson, first witness for the defendants—'I am engineer of the defendants. There was no strike during the progress of the work, and no extension of time was given by me. I made frequent complaints of delay, both written and verbal. I spoke to the plaintiff about the penalties, and told him that the Council was in no mood to let him off. Then I was trying to hurry him up. I was present at the meeting of the Council on

(1) L. R. 6 Q. B. 115. (2) [1892] 1 Q. B. 127.

the 18th March; plaintiff was there with his solicitor, also Hillyard, the Chairman of the Council.' [Letters of witness to Healy, Clerk of the defendants, dated 27th August, produced and entered by the plaintiff without objection.] Question: 'Did you at all determine the question of penalties?' [Objected to by plaintiff's counsel, but allowed by me subject to objection.] Answer: 'No. I was aware of the resolution of the Council of November 5th, 1909. I did not speak to the plaintiff about that resolution. I was aware also of the resolution of 7th May, 1909.' [Read.]

"Cross-examined by Sullivan, K.C.—'I never wrote to Gallivan threatening him with penalties. . . . I issued my final certificate, intending it to be for a net sum, upon payment of which there was to be an end of the whole contract so far as I was concerned. I am almost sure that there would have been an end of the transaction if there had been money to meet the orders.'

"Michael Healy, second witness for defendants, Clerk of the Council, formally proved correspondence and resolutions of the Council.

"John Hillyard, third witness for the defendants, described what took place at the Council's meeting on 18th March, 1910.

"This closed the defendants' case. Serjeant Moriarty then renewed his requisition for a direction for the defendants, and objected to any question being left to the jury. Lynch, K.C., urged me to leave to the jury the two questions mentioned in the certificate, and, in the alternative, asked for judgment for the plaintiff on the ground that, upon the true construction of the contract, Hickson was the sole arbitrator as to whether its conditions had been complied with, and that his certificate was final and conclusive on all points, penalties included. It was agreed by both sides that the cottages were not completed until fifteen weeks after the time agreed upon, and that, therefore, if the full amount of the penalty was recoverable, the amount to be deducted from the contract price was £75. I was of opinion that there was no evidence of waiver by the defendants of the penalty clause, and on the true construction of the contract I thought that the sum of £5 per week, to be deducted in case of delay, should, on the authorities cited by defendants' counsel (particularly the case of *Law* v. *Local Board of Redditch* (1)), be regarded as liquidated

(1) [1892] 1 Q. B. 127.

K. B. Div. 1911.

GALLIVAN v. KILLARNEY U. D. C.

damages, and not merely as a penalty. I thought it better, however, to leave the questions I was asked to leave to the jury, so as to avoid, if possible, the necessity of a second trial in any event. The jury answered the questions as set out in the certificate. On the point raised by the plaintiff's counsel, that the certificate of Hickson was conclusive evidence that no sum could be deducted for delay, I was of opinion that the contract did not confer upon the engineer any jurisdiction to determine any question as to delay in the completion of the works, except in the case of strikes or lock-outs, which did not occur, and inasmuch as it was proved by him (though this evidence was objected to by the plaintiff) that he had not, as a matter of fact, at all considered the questions as to whether penalties were recoverable or not. I ruled, notwithstanding the finding of the jury on the second question, that the amount lodged in Court was sufficient, and gave judgment for the defendants. I ordered the money to be retained in Court to meet the defendants' costs, and the balance, if any, over and above same to be paid to the plaintiff in full satisfaction of his demand.

"RICHARD R. CHERRY."

The questions left to the jury, and their answers thereto, were thus stated in the certificate:—

"1st. Did the defendants waive their right to enforce the penalty clause contained in the contract between the parties? Answer—No.

"2nd. What damages, if any, did the defendants sustain by reason of the plaintiff's delay in completing the contract? Answer—£30."

The material portions of the contract were as follows:—

"This agreement witnesseth that in consideration of the sum of £2345 0*s.* 6*d.*, to be paid by the Council to the contractor in the manner hereinafter appearing, that is to say, in monthly instalments, the instalments to be payable on the certificate of the Council's engineer for the time being, the contractor hereby covenants and agrees to and with the Council that he shall and will within one week from the signing hereof begin the works for the erection of the said houses, and shall and will, after the expiration of nine months from that date, unless the said works

be delayed by reason of strikes or lock-outs affecting any of the building trades, for which an allowance shall be made by the said engineer, and then the contractor is to complete the works within such time as the engineer shall consider to be reasonable, and shall from time to time appoint, well and substantially build, erect, roof, cover in, and completely finish, according to the said plans and specifications hereto annexed, in a good, substantial, and workmanlike manner, and carry out all the necessary work in connection therewith according to the instructions and directions, and in the manner expressed or contained in the said plans and specifications, and provide, execute, perform, and fully complete all and singular the material works specified, required, and set forth in the said plans and specifications, or to be implied, or to be incidental thereto, or to be hereafter specified or required in such explanatory instructions and drawings (being in conformity with the said original specifications, plans, sections, elevations, drawings, and specifications and drawings), and also such additional instructions and drawings (not being so in conformity with the said original specifications, plans, sections, drawings, and elevations as aforesaid) as shall from time to time during the progress of the said works contracted for be provided by the said engineer or other engineer for the time being of the said Council, and will complete all said works with materials of the best quality, and in the most substantial and workmanlike manner, and to the satisfaction of the said engineer or such other engineer or engineers as aforesaid without reference to any other person, and will in all respects comply with and abide by the true intent and meaning of the said plans, sections, elevations, drawings, and specifications, and this contract; and if the same is not completed within the period or periods aforesaid the contractor shall forfeit out of the money which shall be due to him by virtue of this agreement the sum of £5 sterling for every week which shall elapse after the expiration of the said period of nine months, or other period as aforesaid, from one week after the signing of these presents as aforesaid, . . . and it shall be lawful for the said engineer as aforesaid, or for the Council, at any time or times to make any alterations or additions or to supply omissions in the works hereby contracted for, and that he or they shall give to the contractor or his foreman written

K. B. Div. 1911.

GALLIVAN v. KILLARNEY U. D. C.

instructions for such alterations, deviations, or omissions, signed by the said engineer, or such other engineer as aforesaid; and the parties hereto covenant and agree that any such alteration, deviation, or omission shall not vacate this agreement, but shall be ascertained by an admeasurement or valuation to be made by the engineer, or such other engineer as aforesaid, and the value thereof so ascertained shall be added to or deducted, as the case may be, from the said sum of £2345 0*s.* 6*d.* And the contractor further covenants that he will generally execute and provide not only all the works and materials described and specified in the said plans, sections, and elevations, drawings, and specifications respectively, but likewise all such works and materials as are necessarily implied, or may be reasonably implied or inferred, in or from the plans, sections, elevations, drawings, specifications, and contract respectively for the construction or completion of the said works, and every part thereof, although the same may not happen to be therein expressly mentioned as to be done by the said contractor, and that the true intent and meaning of these presents is that the works and materials hereby contracted to be done, executed, and provided shall include all that is requisite for the construction and completion of the said house and premises, and all works in connection therewith, according to the said plans, sections, elevations, drawings, and specifications, and that the decision of the said engineer, or such other engineer as aforesaid, with respect to the amount stated and condition of the works actually executed, and also in respect of any other question that may arise concerning the construction of the said plans, sections, elevations, drawings, and specifications, and contract, and the execution of the works included therein, or in anywise relating thereto, shall be final and legally binding, and without appeal."

The following were the grounds for setting aside the judgment entered for the defendants at the trial as stated in the notice of motion:—(*a*) "That the learned Judge at the trial should have directed the jury in favour of the plaintiff's claim. (*b*) That the learned Judge was wrong in his ruling that by reason of the wording of the clause in the contract relating to detailed drawings the plaintiff had expressly contracted to do not only the original work, but any extra works that might be ordered within the con-

tract time. (*c*) That the learned Judge was wrong in his ruling that, notwithstanding the final certificate of the engineer as to the sum payable in full discharge of the contract, the defendants were entitled to withdraw the question of penalties from the engineer, and sue therefor by independent proceedings. (*d*) That the learned Judge was wrong in his ruling as to the date by which plaintiff was bound to complete the contract works and extras subject to penalties. (*e*) That the learned Judge should have directed the jury that the engineer was the sole judge of the matters arising under the contract as to the amount to be allowed for extras, as to the reasonable time that such extras might take, and as to the ultimate net balance to be paid to plaintiff, and that by the certificate of the engineer defendants were precluded from insisting on any further deduction from the plaintiff's claim."

The grounds stated for the application for a new trial were the following :—" Misdirection and admission of illegal evidence to vary or explain matters of the contract and certificate."

P. Lynch, K.C., and *A. M. Sullivan, K.C.* (with them *James Rearden*), for the plaintiff.

[Counsel referred to *Dodd* v. *Churton* (1); *Holme* v. *Guppy* (2); *Westwood* v. *Secretary of State for India* (3); *Jones* v. *St. John's College, Oxford* (4).] By the contract the defendants' engineer had jurisdiction to determine by his certificate the question whether penalties had arisen and were enforceable. The contract price was to be paid on the certificate of the engineer, and the penalties were to be deducted from the money for the time being due to the plaintiff under the contract. Those moneys were determined by the certificate of the defendants' engineer, upon whose certificate alone the plaintiff could be paid: *Laidlaw* v. *Hastings Pier Company* (5). In *Connor and Olley* v. *Belfast Water Commissioners* (6),

(1) [1897] 1 Q. B. 562.
(2) 3 M. & W. 387.
(3) 11 W. R. 261; 7 L. T. (N. S.) 736.
(4) L. R. 6 Q. B. 115.
(5) Jenkins and Raymond's Architects' Legal Handbook, 4th ed., App., p. 238.
(6) I. R. 5 C. L. 55.

K. B. Div. 1911.

GALLIVAN v. KILLARNEY U. D. C.

where the certificate dealt with extras, and there were no written orders for these, the Court held that the certificate was conclusive as to the regularity of the proceedings. As a Court speaks by its orders so an engineer in these cases speaks by his certificate, and the state of his mind when he gave the certificate cannot be inquired into; but here, not only by the certificate, but also by conduct, the defendants are estopped from raising the question of penalties, since their engineer stated in his evidence that he intended by his final certificate to deal finally with the contract.

Serjeant Moriarty, K.C., and *George M'Sweeny, K.C.*, for the defendants.

This was substantially an action for penalties as appears from the defence and reply. The plaintiff, in order to succeed, was bound to have had a finding in his favour that he had been prevented from completing by the extras ordered. There is no such finding here. Under the contract the defendants' engineer had no jurisdiction to determine the question of penalties; but if, in fact, he had that power, and his certificate is silent as to them, the question arises whether it was not competent for the defendants by oral evidence to show that, in fact, he did not take into consideration the question of liability to penalties when giving that certificate: *British Thompson Houston Company* v. *West Bros.* (1); Hudson on Building Contracts, pp. 529–530, vol. i.

We rely upon the common law. Evidence was given to confirm a certificate which did not purport to take into consideration the penalties. The contract in *Jones* v. *St. John's College, Oxford* (2), is almost similar to the contract here.

A. M. Sullivan, K.C., in reply:—

The evidence as to prevention by the extra works is that of two witnesses for the plaintiff, and that is not controverted. If the extras caused any part of the delay, that is sufficient to prevent the penalty clause from operating. The evidence as to the prevention being all one way, by the time the case came to

(1) 19 T. L. R. 493. (2) L. R. 6 Q. B. 115.

be left to the jury the act of prevention was an admitted fact, and once the learned Serjeant concluded that the case was ruled by the decision in *Jones* v. *St. John's College, Oxford* (1), the question of the prevention became immaterial. The contractor was not the plaintiff upon the question of the penalties, but the defendant. The *onus probandi* lay upon the defendants, who should discharge it by showing not only that penalties had in fact arisen, but also that they had survived: *Dodd* v. *Churton* (2). The contract here is peculiar in that it only provides that the penalties are to be deducted from the contract price. The usual course is to provide three remedies (1) covenant; (2) deduction; and (3) set-off. In the case of two of these, there being a separate covenant, a separate action for the penalties can be maintained after the payment of the contract price. Hudson (Building Contracts, 3rd ed., pp. 397 and 398) cites the case of *Laidlaw* v. *Hastings Pier Company* (3), as belonging to the class of case where deduction alone is provided. The only case where evidence was admitted to vary the certificate was *Jones* v. *St. John's College, Oxford* (1), where it was admitted on a demurrer. [Counsel also referred to *Northampton Gas Company* v. *Parnell* (4); Halsbury's Laws of England, vol. iii, pp. 215, 216.]

BOYD, J.:— Nov. 23.

In this case, having regard to the terms of the contract entered into between the parties, I am of opinion that the defendants are entitled to retain the judgment which has been entered in their favour by Lord Justice Cherry.

By the agreement of 24th February, 1909, the plaintiff undertook that within one week from the signing thereof he would begin the works, and that he would, after the expiration of nine months from that date, "unless said works be delayed by reason of strikes or lock-outs affecting any of the building trades, for which an allowance shall be made by the engineer,

(1) L. R. 6. Q. B. 115. (2) [1897] 1 Q. B. 562.

(3) Jenkins and Raymond's Architects' Legal Handbook, 4th ed., App., p. 238.

(4) 15 C. B. (N. S.), 630.

K. B. Div. 1911.

GALLIVAN v. KILLARNEY U. D. C.

Boyd, J.

and then the contractor is to complete the works within such time as the engineer shall consider to be reasonable, and shall from time to time appoint"—carry out all the necessary works in connexion therewith according to the instructions and directions and in the manner contained in the plans and specifications, or to be thereafter specified or required in explanatory instructions and drawings in conformity with the original specifications "and *also such additional instructions and drawings, not being so in conformity with said original specifications*, plans, sections, drawings, and elevations as aforesaid as shall from time to time during the progress of the said works contracted for, be provided by the said engineer—and will complete all said works . . . and if the same is not completed within the period or periods aforesaid, the contractor shall forfeit, out of the money which shall be due to him by virtue of the agreement, the sum of £5 sterling for every week which shall elapse after the expiration of nine months, *or other period as aforesaid*, from one week after the signing of these presents as aforesaid."

From the above extracts from the contract it is clear to my mind that the plaintiff became bound to complete within the nine months not only all the work mentioned in the specifications, but also all the work for which he might receive additional instructions and drawings; only in the event of delay being caused by "strikes or lock-outs" had the engineer any power to extend the time. The very specific mention of such power being limited to the above causes of delay, excludes his power to extend the time for delay otherwise caused. It was not attempted to be proved at the trial that the engineer did, in fact, ever extend the time for completion. In the case of *Dodd* v. *Churton* (1), relied on by the plaintiff, Lord Esher, M.R., at page 566, states that the contract in that case provided that the works mentioned in the specification were the only works the builder was bound to execute within the time, and that "it was *admitted* that extra work was ordered, and that the *necessary result* of the builder having to do that work was that it took him more time to complete the works than if he had only had to do the work

(1) [1897] 1 Q. B. 562.

originally specified." No such admission exists in the present case, and the terms of the contract are different. In *Jones* v. *St. John's College* (1), relied upon by the defendants in this case, the contract was similar to the present case, and Lord Esher draws the distinction between the terms of the contract in that case, and the case he was deciding.

I am of opinion that the contract in this case provides that all the works, extra as well as those under the specifications, shall be completed within the nine months. It appears from the evidence that the nature and character of the extras could not posssibly have caused any appreciable delay, and the plaintiff in his correspondence attributed the delay to frost and snow, and not to the execution of the extra works. The only extra works mentioned in the evidence were trap-doors in the ceilings and other trivial works. No doubt, the plaintiff stated in his evidence, "I was detained by the extra works ordered. That is why I was late in completing the contract." He was allowed in the final certificate £20 11*s.* for the extra works. He further stated in his evidence, "I thought there was an allowance of extra time for bad weather in the contract, and I was prevented from finishing the works in time by bad weather—snow and frost. The extras also delayed me. I said nothing about the weather or the extras at the meeting of the Council on the 8th of March."

It is to be noticed the difference of his expressions as to extras and bad weather. He states he was *detained* by the extras, but was *prevented* from finishing in time by bad weather. The Council repeatedly complained of the plaintiff's delay during the progress of the works, and, on the 18th November, 1909, he wrote a letter to them stating as his excuse that "broken weather" was a great hindrance. From the nature of the extra work he could not and did not allege, either in his correspondence, interviews, or evidence, that he was thereby *prevented* from finishing the works in due time. This is material having regard to the authorities on the subject. However, I do not consider this point material, having regard to my construction of the contract.

The other contention on behalf of the plaintiff is, that as the

(1) L. R. 6 Q. B. 115.

K. B. Div. 1911.

GALLIVAN v. KILLARNEY U. D. C.

Boyd, J.

engineer in his final certificate states the sum due to him, he waived the penalties and ascertained the sum to which he was entitled. In my opinion, the engineer has, under the contract, no power or authority to waive the penalties or to deal with them in any way. The contract expressly provides for the payment of the penalties "out of the money which shall be due to him by virtue of this agreement." The engineer had to certify from time to time the money which was due to him, and nothing else. This he has done in his various certificates, including the final one; and the defendants contend that out of the sum so found due to the plaintiff, they are entitled to the payment of the penalties, and, in my opinion, they are right in this contention.

From the course of the trial, as indicated in the report of the learned Lord Justice, and the issue which he submitted to the jury, at the request of counsel for the plaintiff, I am of opinion that the case finally resolved itself into the question of waiver of the penalties by the defendants, and the jury found that there was no waiver.

On the consideration of all the facts and of the law applicable to the case, I am of opinion the learned Judge rightly entered the judgment for the defendants.

GIBSON, J.:—

This was an action to recover the balance on a builder's contract, dated 24th February, 1909, for the construction of certain cottages, which balance was certified in his final certificate by the engineer named in the contract. The only defence was in respect of penalties under the contract. The counter-claim for (*inter alia*) damages for delay was struck out by consent. A question was put to the jury, at plaintiff's instance, as to damages for delay, which the jury assessed at £30; but this question was left to the jury on the view that the penalties were not liquidated damages, and it was not argued before us that, if penalties were not recoverable, damages could take their place and be enforced. As noted above, the counter-claim has been withdrawn.

Two points were discussed—(1) Whether, if the extras ordered made completion within the contract time (nine months)

impossible, that would defeat and extinguish the penalty clause. (2) Whether the final certificate of the engineer was a decision against the defendants' right to penalties, and made penalties irrecoverable.

The first question only arises if the extra works amounted to prevention. This is a question of pure fact, as to which no question was asked to be left to the jury on either side. Having regard to the report of the learned Judge, who states that there was no substantial dispute of fact, and to the course of the trial, I think that this question of fact was assumed in the plaintiff's favour, defendants' counsel staking their case on the proposition of law that, under the contract, the penalty clause could not be affected by any delay caused by extras, and on the applicability of *Jones's Case* (1) to the present contract.

Counsel did not dispute that, if prevention making completion within the contract time impossible was governed by *Holme* v. *Guppy* (2) and *Russell* v. *Bandeira* (3), the penalty clause was made inoperative, so that no subsequent delay could be subject of penalties even though such delay might entail liability for damages. Once the *terminus a quo* is destroyed, penalties cannot run; a new time limit cannot be substituted.

The only case in which prevention by extras was held to be covered by the contract and to be at the contractor's risk was *Jones's Case* (1), decided on demurrer. There the terms of the contract were very special, and were construed as excluding the principle of *Holme* v. *Guppy* (2). The general rule of construction is, that an intention to put one party to a contract at the mercy of the other ought to be clearly expressed: *Roberts* v. *Bury Commissioners* (4). Lord Justice Cherry held that the case was governed by *Jones's Case* (1). I am unable to agree with him. The agreement here wants all the special provisions on which *Jones's Case* (1) was decided.

The engineer is not authorized to extend the time in consequence of extras. The right of the engineer to give explanatory instructions and drawings and to add instructions and drawings, and to require the contractor to execute and supply all works and

(1) L. R. 6 Q. B. 115.
(2) 3 M. & W. 387.
(3) 13 C. B. (N. S.) 149.
(4) L. R. 5 C. P. 326-7.

K. B. Div. 1911.

GALLIVAN v. KILLARNEY U. D. C.

Gibson, J.

materials reasonably to be implied or inferred, does not extend to the extras dealt with in the subsequent clause. The penalty clause pivots on the earlier provision as to instructions and drawings, which contemplates action by the engineer and no one else. He has supreme authority in the matter of such instructions and drawings. The subsequent clause as to extras is detached in order and substance from the penalty clause; it contemplates a different subject-matter, as to which the Council are given rights independently of their engineer, and the extras and alterations referred to must be ordered in writing. The clause does not fit into the penalty provision, which depends entirely on non-completion of work directed by the engineer alone in pursuance of his own original or supplemental instructions and drawings. It is argued that the provision that alterations, &c., are not to vacate the agreement shows that extras are brought within *Jones's Case* (1). It is, however, in common form, and cannot have such effect, as appears from many cases, of which *Dodd* v. *Churton* (2) is a recent example. The power of the Council to intervene with orders appears decisive against the application of *Jones's Case* (1). Explicit language would be necessary to make a contractor liable to penalties for delay caused not by additional work ordered by the responsible engineer, but by the Council at pleasure.

The second point relied on for the plaintiff was the engineer's final certificate, which, it was contended, was to be read as a decision against liability for penalties. Though at first I thought otherwise, on consideration I am inclined to think that the jurisdiction conferred on the engineer does not extend to deciding whether the penalty clause was or was not excluded by the order for extras. It does not authorize him to decide whether *Holme* v. *Guppy* (3) applied or not: *Roberts* v. *Bury Commissioners* (4); *Dawson* v. *Wallasey Local Board* (5); *Pashby's Case* (6). His certificate was not a condition precedent to the right to recover penalties for delay, at least where he had no jurisdiction to enlarge time.

(1) L. R. 6 Q. B. 115.
(2) [1897] 1 Q. B. 562.
(3) 3 M. & W. 387.
(4) L. R. 5 C. P. 310.
(5) 11 Q. B. D. 229.
(6) 18 C. B. 2.

Assuming, however, that the engineer had authority to decide such questions, the points remain: Does the certificate amount to a decision adverse to penalties? and if it might be so construed, was oral evidence admissible to show that, in fact, the engineer excluded the question from the decision? A decision of Phillimore, J., has been cited in support of such admissibility; the plea in *Jones's Case* (1), which the Court held good, supports the same view; and the opinion of Blackburn, J., in the *Buccleuch Case* (2), approving of *Brophy* v. *Holmes* (3), is in the same direction. See also *Smith's Case* (4). An engineer is not an arbitrator: *Wadsworth* v. *Smith* (5); but reasoning as to awards is relevant as to building certificates. I, therefore, concur with Cherry, L.J., that the certificate cannot be relied on as excluding liability to penalties.

Being of opinion that *Jones's Case* (1) does not apply if there was prevention in fact, the case falls within *Holme* v. *Guppy* (6), and the plaintiff must succeed. That such prevention was assumed and not disputed I deduce from the report of the learned Judge and the course of the trial. If my deduction is not well founded, there should be a new trial to ascertain the true state of facts. That would be a regrettable result, as the whole trial would go for nothing and the costs would be thrown away. Had the point appeared to be in controversy, it would have been put to the jury by the learned Lord Justice of his own motion.

The verdict will be changed and judgment entered for the plaintiff for the sum certified for (without interest) with costs, and the sum lodged in Court will be paid out in part satisfaction. The plaintiff will have his costs of this argument.

It was conceded that, whether extras were ordered in writing or not, the final certificate was conclusive: *Goodyear's Case* (7); *Richards* v. *May* (8).

My brother Madden concurs in this judgment.

Solicitor for the plaintiff: *Maurice M'Cartie.*

Solicitor for the defendants: *D. M. Moriarty.*

C. N. K.

(1) L. R. 6 Q. B. 115.
(2) L. R. 5 Ex. 230.
(3) 2 Molloy, 1.
(4) [1910] 2 I. R. 303.
(5) L. R. 6 Q. B. 332.
(6) 3 M. & W. 387.
(7) 1 Hudson, 397.
(8) 10 Q. B. D. 400.

K. B. Div.
1912.
Jan. 31.
May 10.

THE KING (BOYLAN) *v.* THE JUSTICES OF LONDONDERRY (1).

Justices—Order to find sureties for the peace and good behaviour—Showing jurisdiction on face of order—Bona fide *question of title involved.*

An order of Justices requiring a person to find sureties to keep the peace and be of good behaviour must show on its face facts necessary to give the Justices jurisdiction to make such order.

So *held* by Palles, C.B., and Gibson, J. (Lord O'Brien, L.C.J., *dubitante*).

The prosecutor was charged as defendant on the prosecution of a head constable of the Royal Irish Constabulary on a summons in the following form:—"Whereas a complaint has been made to me that you, the defendant, on the 6th day of November, 1911, at . . . did unlawfully assault John Begley and James Begley of . . . , and to show cause why you should not be bound to be of the peace and good behaviour." The case was heard by the Justices at Petty Sessions. It appeared from the evidence that an assault had been committed by the defendant, arising out of a dispute involving a *bona fide* question of title. The magistrates made an order which was entered in the order book. It set out the complaint as in the summons, and ordered that the defendant should enter into security by recognizance to keep the peace and be of good behaviour for twelve months, and in default should be imprisoned.

Held, by Palles, C.B., and Gibson, J.; Lord O'Brien, L.C.J., *dubitante*, that the order did not show jurisdiction on its face and should be quashed on *certiorari*.

The question whether Justices have power to bind to the peace where a *bona fide* question of title is raised, considered.

The prosecutor, Patrick Boylan, was charged as defendant in a summons at the prosecution of Samuel Doherty, Head Constable, Royal Irish Constabulary, the material statements in the summons being as follows:—"Whereas a complaint has been made to me that you, the defendant, on the 6th day of November, 1911, at Ballyscullion, in the county of Londonderry, did unlawfully assault John Begley and James Begley of Ballymultimber, and to show cause why you should not be bound to be of the peace and good behaviour. This is to command you," &c.

The summons was heard at the Petty Sessions at Limavady,

(1) Before Lord O'Brien, L.C.J., Palles, C.B., and Gibson, J.

in the county of Londonderry, and it appeared from the evidence that an assault had been committed by Boylan on the Begleys, arising out of a dispute as to a right to take sea-weed from certain lands. No evidence was given that the Begleys had declined to prosecute. The solicitor for the defendant submitted that the Justices had no jurisdiction to determine the case, on the ground that the Begleys had not declined to prosecute, and also on the ground that a *bona fide* question of title was involved.

The magistrates made an order that the defendant should enter into recognizances to keep the peace and be of good behaviour. The order was entered in the Petty Sessions order-book. It set out the cause of complaint as in the summons, viz.:—"The defendant on the 6th day of November, 1911, at Ballyscullion, in the county of Londonderry, did unlawfully assault John Begley and James Begley of Ballymultimber, and to show cause why you should not be bound to be of the peace and good behaviour." The particulars of the order made were set out as follows:—"That the defendant enter into security by recognizance, himself in £10, with two sureties in £5 each, to keep the peace and be of good behaviour towards all His Majesty's subjects, and particularly towards the said John Begley and James Begley, for the period of twelve calendar months, and in default of entering into security as aforesaid to be imprisoned in Londonderry gaol for the period of one calendar month, unless the recognizance is sooner entered into. Allowed until 7th December to enter into said recognizance at request of defendant's solicitor."

The prosecutor obtained a conditional order for a writ of *certiorari* to bring up and quash the order of the Justices, on the grounds that it was made without and in excess of jurisdiction, (*a*) as a *bona fide* question of title was involved in the determination of the complaint, (*b*) as the defendant was acting under a *bona fide* claim of right to property. Subsequently, by leave of the Court, the following further ground was inserted:—"(*c*) That the order is bad on its face, because it does not disclose the facts which authorized the Justices to exercise their jurisdiction."

The present application was on behalf of the prosecutor to make the conditional order absolute, notwithstanding cause which had been shown on behalf of the Crown.

K. B. Div. 1912.

THE KING (BOYLAN) v. JUSTICES OF LONDONDERRY.

Horner, K.C. (with him *Julian*), for the prosecutor:—

The order is bad on its face, inasmuch as it does not set out facts showing that the Justices had jurisdiction to make it. In every case of an order by Justices it must expressly appear on the face of the order that the Justices had jurisdiction to make it, and the facts raising such jurisdiction should be shown, or it will be bad: Burns, Justice of the Peace, 30th ed., p. 1109; *The Queen* v. *Treasurer of County Kent* (1), *per* Denman, J., p. 606, and Hawkins, J., p. 607; *The Queen* v. *Campbell* (2), *per* Crampton, J., p. 588; *Day* v. *King* (3), *per* Williams, J., p. 367. There is no distinction in this respect between orders binding over to keep the peace and be of good behaviour, and other orders. If a person informs the Court that he goes in fear and danger of personal violence by reason of the threats of another, surety may be granted. "Unless such a case appear, no jurisdiction appears": *The Queen* v. *Dunn* (4), *per* Lord Denman, C.J., p. 617. Dalton, dealing with the subject of sureties for the peace, says:—"This precept or warrant then must be made in writing, and under the Justice his seal, . . . and must contain the cause and at whose suit": Dalton, Justice of the Peace, p. 271. "If it be for the peace or good behaviour where sureties are to be found or required, then the warrant ought to contain that special cause": *Ib.*, p. 440. The form of warrant given in Dalton (p. 459) recites that the complainant has taken a corporal oath that he is afraid that the defendant will beat him, &c. In *The Queen* v. *The Justices of Londonderry* (5) the summons set out facts showing jurisdiction. In *The Queen* v. *Wilkins* (6) the order showed jurisdiction on its face; it alleged defendant's statement on oath that the complainant had used threats towards him calculated to provoke a breach of the peace.

Where a question of title to land is involved, as in the present case, there is no jurisdiction to bind to the peace: *Rex (Mahon)* v. *Justices of Antrim* (7).

(1) 22 Q. B. D. 603.
(2) 3 I. C. L. R. 586.
(3) 5 A. & E. 359.
(4) 12 A. & E. 599.
(5) 28 L. R. Ir. 440.
(6) [1907] 2 K. B. 380.
(7) 41 I. L. T. R. 225.

The Solicitor-General (*Ignatius O'Brien, K.C.*), and *J. Linehan*, for the Crown :—

K. B. Div. 1912.

THE KING (BOYLAN) v. JUSTICES OF LONDONDERRY.

Orders binding to the peace or good behaviour are not governed by the Petty Sessions (Ireland) Act, 1851. Sect. 21 of that Act, requiring orders to be entered in the order-book, deals only with cases in which evidence can be adduced on both sides, and has no application to orders binding to the peace or good behaviour. The provisions of sub-sect. 2 of section 21, as to orders made out of Petty Sessions, apply only to orders permitted by the Act itself to be made out of Petty Sessions, that is to say, the cases mentioned in section 8, sub-sect. 2. The intention was to leave in force the old procedure in cases of surety for the peace and good behaviour. Under the old procedure it was the warrant or precept, not the order, which was required to set out the cause. An order could be made even by word of mouth: Dalton, Justice of the Peace, pp. 270, 271. No warrant was necessary if the party against whom the surety was sought was present before the Justice: *Ib.*, p. 271. Orders for sureties for the peace and good behaviour are essentially different in their nature from all other orders of Justices, inasmuch as this Court on *certiorari* can examine the evidence, and if insufficient quash the order: *The Queen* v. *The Justices of Londonderry* (1). What is looked at in cases of this kind is not the order, but the evidence. This essential difference is referred to by Holmes, J., in his judgment in the last-mentioned case (p. 459), and he goes on to say:—"In an order requiring sureties, however, nothing appears that would enable us to say, *prima facie*, that the magistrate had jurisdiction, unless we inquire into the evidence or facts upon which he acted." The omission from the order of facts showing jurisdiction inflicts no hardship on the person required to enter into surety, since he is entitled on *certiorari* to go into the whole evidence which was before the Justices.

But assuming that the order must set out facts authorizing it, we submit that such facts are set out here. The complaint is not a charge of assault—it would have been bad as such, since it does not state that the party aggrieved had declined to prosecute—it is

(1) 28 L. R. Ir. 440.

K. B. Div. 1912.

THE KING (BOYLAN) v. JUSTICES OF LONDONDERRY.

a demand for sureties based on an assault. An order reciting such complaint sufficiently shows jurisdiction: *Ex parte Davis* (1). It is no longer considered necessary that an order binding to the peace should state that the complainant goes in bodily fear of the defendant: *Rex.* v. *Wilkins* (2).

There was ample evidence before the magistrates to justify the order; therefore, even assuming it to be bad in form, the Court in the exercise of its discretion should refuse *certiorari.*

The principle that where a question of title to land is involved the jurisdiction of the Justices is ousted, does not apply to a preventive jurisdiction such as requiring sureties for the peace and good behaviour.

Julian, in reply, referred to *Kennington* v. *Daniel* (3); *The Queen* v. *O'Brennan* (4); *Fitzpatrick* v. *Pine* (5).

May 10.

LORD O'BRIEN, L.C.J.:—

I have considered this case very carefully, and have discussed it with the Lord Chief Baron and my brother Gibson, yet I own I am by no means free from doubt. It is said that the facts giving jurisdiction to make the order do not sufficiently appear. I have great doubt as to whether the order, taken in connexion with the complaint and the allegations therein, does not sufficiently disclose the facts. See also the opinion of Holmes, J., in *The Queen* v. *The Justices of Londonderry* (6). The facts here, if looked at, disclose not only a breach of the peace, but a carnival of breaches of the peace, and this is, in my opinion, a case where sureties for the peace and good behaviour alone are sought. Punishment and conviction are not sought; and though there be an acquittal, it is, if the facts warrant it, competent to bind to the peace or good behaviour. However, on the whole, though I have great doubt, it is not so coercive as to compel me formally to dissent from the Lord Chief Baron and my brother Gibson. I regret I must now leave, as there is a jury waiting for me in a case which has been partly heard.

(1) 24 L. T. (N. S.) 547.
(2) [1907] 2 K. B. 380.
(3) 22 L. R. Ir. 667.
(4) 3 I. C. L. R. 589.
(5) 13 I. C. L. R. 32.
(6) 28 L. R. Ir. 440, at p. 459.

PALLES, C.B. :—

This is an application for a writ of *certiorari* to bring up for the purpose of being quashed an order of Justices directing the prosecutor to enter into a recognizance with sureties to keep the peace and be of good behaviour, and further directing that in default he shall be imprisoned for a calendar month unless the recognizance be sooner entered into.

The order was made on the hearing of a summons brought by the Head Constable of the Royal Irish Constabulary at Limavady, which complained that the prosecutor assaulted John Begley and James Begley, and called upon the prosecutor to show cause why he should not be bound to be of the peace and of good behaviour.

It was not alleged in the summons that the Begleys had refused to prosecute, but this omission was one which, if there had in fact been such a refusal, the Justices would have had jurisdiction to amend.

It appeared during the hearing that the assault had been committed under circumstances which involved the determination of a *bona fide* question of title to land, and thereupon the jurisdiction of the Justices to adjudicate upon the complaint of assault (so far as it involved criminal responsibility on the prosecutor) determined.

I am, however, satisfied upon the affidavits that in the course of the evidence given before the Justices, facts were proved before them which showed such reasonable apprehension that a future breach of the peace would be committed by the prosecutor, as gave them jurisdiction to make an order on him to find sureties for the peace and to be of good behaviour.

It, however, by no means follows that because the Justices had jurisdiction to make an order, therefore they had jurisdiction to make the order actually made. Every order of a Justice must not only be one within his jurisdiction, but must show on its face the facts which brought the matter within the jurisdiction.

Various objections have accordingly been taken to the order, but as I base my decision on one only of those objections, it is unnecessary that I should refer in detail to the others. That objection is the one I have already alluded to, that the order does

K. B. Div. 1912.

THE KING (BOYLAN) v. JUSTICES OF LONDONDERRY.

Palles, C.B.

not state upon its face the facts which were necessary to give the Justices jurisdiction to hold the prosecutor to be of the peace and of good behaviour.

The prosecutor was not convicted of the assault, nor had the Justices jurisdiction so to convict him; and to prevent what I say being misunderstood or misapplied, I desire to state explicitly that the difficulty which has occurred in the case cannot arise in any case in which there has been a due conviction for an assault, for such a conviction in itself gives jurisdiction to the convicting Justices to require sureties.

The mere cesser of jurisdiction to convict or to adjudicate on the charge of assault, did not necessarily terminate the jurisdiction of the Justices to require sureties: *Ex parte Davis* (1); but as the jurisdiction of the Justices to make the order to find sureties was conditional upon their being satisfied on the evidence of the existence of a certain state of facts, it was essential that the existence of that state of facts should appear upon the face of the order, or at least that evidence of its existence should be contained in written depositions referred to by, and incorporated in, the order.

Thus, there not being a conviction, the order should have shown either a threat by the prosecutor of future violence, or an attempt to or an intention to commit an assault, or some other state of facts which would render it reasonably probable that he would be guilty of a future breach of the peace.

A good example of a case in which Justices would have jurisdiction to hold to the peace upon evidence given in a case in which, as in the present, title to real property was involved, is given by Lord Campbell in an interlocutory observation made by him in *Reg.* v. *Mallinson* (2), to which my brother Gibson has been good enough to refer me. There the learned Chief Justice says:—"A right of way is not to be asserted by a breach of the peace. A man disputing such a right is not to say 'I will shoot you if you use that path.'"

The learned Solicitor-General has insisted, I confess somewhat to my surprise, that it is not necessary to the validity of an order

(1) 24 L. T. (N. S.), 547. (2) 16 Q. B. 367, at p. 373.

by Justices directing a person who has not been convicted to find sureties, and in default suffer imprisonment, that it should on its face state facts from which an inference can be drawn that there is danger of his committing a future breach of the peace. To my mind the necessity of stating such facts in such an order has always been treated, not only as elementary law, but as essential to personal liberty. It is in truth a branch of the more general rule that not only an order to imprison, but any order made by any authority, no matter how high, not known to the common law, or although known to it, not acting in pursuance of it, must upon the face of it show the facts which give the jurisdiction to make it.

In the well-known case of *Christie* v. *Unwin* (1) this principle was held to avoid and render inoperative an order which was there treated as one of the Lord Chancellor himself, purporting to act under a jurisdiction given by the bankruptcy statutes. "Whether," says Coleridge, J., in that case, "the order is made by the Lord Chancellor or by a Justice of the Peace, the facts which gave the authority must be stated."

When *Christie* v. *Unwin* (1) was cited in the Exchequer Chamber during the argument in *Gossett* v. *Howard* (2), Baron Parke, that great master of the common law, said:—"There is a mistake in the report of *Christie* v. *Unwin* (1) in 11 Adolphus and Ellis; the order was not made by the Lord Chancellor but by the Court of Review." He adds, however—"But, perhaps, it is not important whether such an order was issued by the Lord Chancellor exercising a statutory power given to himself, or by a Court made a Court by statute for specified purposes."

In delivering the unanimous judgment of the Exchequer Chamber in this celebrated case of *Gossett* v. *Howard* (2) (the case which established the right of the House of Commons to have the same credit given to the warrant of its Speaker as to the writ of a Superior Court) Baron Parke reverts to this question of showing the facts which give jurisdiction. "The answer," he says, "to the question as to the validity of the warrant depends mainly upon a preliminary point—on what principle is the instrument to

(1) 11 A. & E. 373, 379. (2) 10 Q. B. 444.

K. B. Div. 1912. THE KING (BOYLAN) v. JUSTICES OF LONDONDERRY. Palles, C.B.

be construed? Is it to be examined with the strictness with which we look at the warrants of magistrates or others acting by special statutory authority and out of the course of the common law, or is it to be regarded as the mandate or writ of a Superior Court acting according to the course of the common law? The Judges who composed the majority of the Queen's Bench seem all to have thought that the Speaker's warrant was to be strictly construed; and Lord Denman and my brother Coleridge appear to have assimilated it to the warrant or commitment of a Justice of the Peace, and applied the same rules of construction to which such an instrument is always subjected. All these three Judges held it to be void, because it did not show a sufficient authority on the face of it to justify the defendant in all he admitted to have done, though they did not agree in the nature of the defect. If this had been the case of a magistrate acting under some statute which gave him a special authority to take a man into custody under the same circumstances as are stated in the three first pleas, we should no doubt have agreed with those learned Judges that a warrant in a similar form would have been void, those circumstances not appearing upon the face of it; for, in the case of special authorities given by statute to Justices or others acting out of the ordinary course of the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions, or inquisitions, ought, according to the course of decisions, to show their authority on the face of them by direct averment or reasonable intendment. Not so the process of Superior Courts acting by the authority of the common law."

This, I hope, is sufficient to establish the general principle. And if it be, as it is, absolutely beyond controversy, so too is its application to an order such as the present. If authority be required for this, it will be found in *Rudyard's Case* (1) (decided so far back as the time of Ventris), *The Queen* v. *Dunn* (2), and the *Queen* v. *O'Brennan* (3).

Davis's Case (4), to which I have already alluded, is relied upon by the Solicitor-General. There the application was to

(1) 2 Ventris, 22.
(2) 12 A. & E. 617.
(3) 3 I. C. L. R. 589.
(4) 24 L. T. (N. S.), 547.

quash the recognizance, not the order; and although if the order were bad the recognizance might be quashed, it would appear that the order was not before the Court, and certainly there was not any allegation that it did not show jurisdiction on its face. It probably was not drawn up. The only decision was that the Justices were right in the course they adopted in—(*a*) directing defendant to find sureties, although they acquitted him and gave him a certificate of acquittal under 24 & 25 Vict. c. 96, s. 44; and (*b*) although there was no information calling upon him to find sureties. Whether the order was in fact right or, if invalid, whether its invalidity was overlooked, it is not an authority in favour of the contention of the Solicitor-General.

There is but one other topic to which I desire to allude. The decision of this Court in the *Londonderry Case* (1), which applied to orders of this description the old common law rule which imposed upon this Court the obligation of quashing orders made without evidence to support them, has been relied on as authorizing us to uphold an order bad on its face by reference to evidence not referred to in it, not even set forth in a deposition or other writing rendering it capable of being referred to. The *ratio decidendi* in the *Derry Case* (1) is to be found in the peculiarly harsh nature of the proceeding to hold to the peace and to good behaviour—a proceeding in which the evidence for the application cannot be contradicted or rebutted. To apply any decision founded on this reason in such a way as to deprive the person impeached in such a proceeding—and thus held to require *special* protection—of almost his only remaining common law right, viz., to see that the order is good on its face, would be a strange anomaly, and one which has neither principle, authority, nor logic to support it. In my opinion the *certiorari* should go.

GIBSON, J.:—

Three questions have been argued in this case. The first and most important is, whether an order binding over to the peace and good behaviour must show on its face valid grounds for such order; the second is, whether the order in fact discloses

(1) 28 L. R. Ir. 440.

K. B. Div. 1912.

THE KING (BOYLAN) v. JUSTICES OF LONDONDERRY.

Gibson, J.

such grounds; and the third is, whether the Court, in the exercise of its discretion, ought to refuse to quash the order, notwithstanding that it may be on its face insufficient.

1. As to the first question, I shall first discuss briefly the procedure before and since the Petty Sessions Act:

(A) In relation to complaints *inter partes*, of which the present case is an example.

(B) Cases in which according to the old books a Justice could order security in respect of conduct in his presence.

(C) Cases where, in a judicial proceeding, without any special application, on evidence or facts in the course of the hearing, an order binding over is made.

(A) As to informations and complaints *inter partes*. The nature of peace jurisdiction has been considered in many recent cases, and in *Mahony's Case* (1) it was finally settled that the jurisdiction being essentially *ex parte* as regards investigation of facts alleged: *Steward* v. *Gromet* (2); *Reg.* v. *Mallinson* (3), it was competent to the defendant bound over by a magistrate's order, though valid on its face, to prove that there were in truth no facts before the Justices to support the order. This exception in favour of the defendant is now sought to be used as an argument that an exception adverse to the defendant is to be introduced into the general principle governing all inferior tribunals, that the adjudication must disclose jurisdiction and due exercise of jurisdiction. The fact that the proceeding is one-sided would rather invite stringent application of the rule.

There are many cases which seem decisive against the Solicitor-General's argument, which is opposed to principle as well.

First, as to the period before the Petty Sessions Act:—Before a warrant could be issued to compel the appearance of the defendant, an information on oath was necessary; and such information was not general, but stated the facts justifying the application: *Bronker's Case* (4): Comyns, Title Justice of Peace, B. 5; Bacon, Surety of Peace, G. 510; Nun and Walsh, ed. 1841, p. 528;

(1) [1910] 2 I. R. 695.
(2) 7 C. B. (N. S.) 191.
(3) 16 Q. B. 367, at p. 371.
(4) Style, 16.

Vane's Case (1); *Reg.* v. *Dunn* (2); *Haylock* v. *Sparke* (3). A warrant to enforce appearance stated the information; see form of precept in Lambard, and forms in Nun and Walsh. To justify a warrant generally, an information was essential: *Caudle* v. *Seymour* (4); *Reg.* v. *Hughes* (5).

When the defendant was brought before the Justice, if the information justified such course, the defendant was required there and then to give security; and on his refusing, a warrant of committal was at once issued for his imprisonment for a fixed time, defeasible if he gave security in the meantime. The warrant of commitment was in such case the Justice's order; there was no separate recorded adjudication; to its validity it was necessary that a valid complaint and sufficient facts should appear; it had to be stated that the defendant had refused to give security, and the maximum period of imprisonment had to be fixed: *Reg.* v. *Kelly* (6); *Atkinson* v. *Carty* (7); *Grady* v. *Hunt* (8). There are numerous cases in the books of actions brought in respect of warrants violating any of the above conditions. The forms in M'Nally, Nun and Walsh, and in Hayes, illustrate the essentials of a valid warrant, and its effect on a judicial determination.

The only case under the old law which I have found where an order was made for security to be perfected *in futuro*, with imprisonment on future breach of such obligation, is *Reg.* v. *Dunn* (2). Where such order was made, it would seem clear that adequate complaint justifying it must have been stated as proved; the duty of the Justice, on breach of the obligation to issue a warrant, would have been merely ministerial; he could not have re-heard the case, or stated in the warrant anything but the previous order and the failure by the defendant to comply with it.

The usual immediate form of warrant being an adjudication on the information was, therefore, as a judicial act, open to *certiorari*, which an ordinary ministerial warrant would not be. *Haylock* v. *Sparke* (3), where *habeas corpus* and *certiorari* were

(1) 13 East, 171.
(2) 12 A. & E. 599.
(3) 1 E. & B. 471.
(4) 1 Q. B. 889.
(5) 4 Q. B. D. at pp. 624–5.
(6) 2 Jebb & Symes, 643.
(7) 1 Jebb & Symes, 369.
(8) 5 Ir. C. L. R. 445.

K. B. Div. 1912.

THE KING (BOYLAN) v. JUSTICES OF LONDONDERRY.

Gibson, J.

allowed, contains a good example of this judicial type of warrant. Taking it to be clear that the warrant as a judicial determination must, before the Petty Sessions Act, have disclosed sufficient grounds to support it, I turn to the Petty Sessions Act. Section 34 and the form under it show that peace applications are within its provisions, and the practice of the Court has proceeded on that view without question up to the present. In such an order as the present, where there has been no refusal by the defendant, and security to be completed subsequently is ordered, it would seem that the order must show jurisdiction, as the subsequent warrant, if the defendant disobeyed the order, would have been plainly ministerial, and could have been made by any Justice—not necessarily the original Justice; such warrant could not properly have set out *de novo* facts not stated in the primary order. If the Petty Sessions record did not disclose the facts, and if the warrant was equally silent, it is impossible to suppose that the defendant would have been in a worse position than he would have been under the old law, exemplified by such cases as *Haylock* v. *Sparke* (1) and *Reg.* v. *Dunn* (2). He would plainly in such an instance be entitled to quash the order, and if in custody to be released on *habeas corpus*.

(B) The jurisdiction of the magistrate in respect of violence in his presence out of Court has been referred to as supplying an argument for the view that no grounds need be stated in a formal order, and I shall briefly discuss the point. The authority of a Justice in relation to peace and good behaviour as described in old books in the times of the Tudors and Stuarts, according to which the Justice might act, not merely in present visible emergency, but on private knowledge possessed by himself *ex informata conscientia* or *motu proprio*, as theologians would describe it, is largely obsolete. No reported instance has been cited; and an oral order binding to the peace would seem hard to fit into the Petty Sessions Act.

There is no doubt that for a breach of the peace occurring before him, a Justice could order arrest with a view to *subsequent* judicial proceedings for peace or otherwise. But an immediate final order there and then binding over would be different.

(1) 1 E. & B. 471. (2) 12 A. & E. 599.

Such order must be subject to the same conditions as a Court order as to refusal by the party charged, and as to time and conditions of detention; and the gaoler would require necessarily a proper warrant specifying these conditions. To justify a gaoler in imprisoning, and to enable the Superior Court to apply *habeas corpus* and *certiorari*, a final commitment must be in writing and the grounds must appear: Paley, 6th ed., p. 337. It is inconceivable that anyone could be detained in gaol for any fixed period of time, a year or otherwise, with conditions as to release in the interim, without there being some written adjudication or warrant. A magistrate, so far as regards the conditions of jurisdiction, cannot have for the purpose of oral orders a wider jurisdiction than he could exercise in Court. These conditions were unsettled formerly, as the arguments in *Willes* v. *Bridger* (1), *Prickett* v. *Gratrex* (2), and other cases show. There is no reported authority in favour of the Solicitor-General's view, which seems opposed to principle and the Petty Sessions Act. No assistance can be derived in the present case, where there was a complaint *inter partes*, from speculations as to the mode of exercising jurisdiction in sudden affrays contemplated by ancient writers.

(c.) With regard to orders made in Court on evidence without any special application for the peace, the only cases mentioned were *Davis' Case* (3) and *Wilkins' Case* (4). Where there is a conviction, it is, of course, clear that the accused can be bound over: *Ex parte Harken* (5); *The Queen* v. *Dunn* (6).

There is no doubt that if, on the facts brought before the Court, a case for binding over is made out, there is jurisdiction to make an order accordingly—whether the original complaint fails, as in *Davis' Case* (3) or succeeds, as in *Wilkins' Case* (4).

In *Davis' Case* (3), the defendant submitted and entered into the recognizance, apparently without any formal order being drawn up. There was no formal judgment on the motion, but interlocutory *dicta* occur on which reliance may be placed as to

(1) 2 B. & Ald. 278.
(2) 2 Q. B. 1028.
(3) 24 L. T. (N. S.) 547.
(4) [1907] 2 K. B. 380.
(5) 24 L. R. Ir. 427.
(6) 12 A. & E. 599.

K. B. Div. 1912.

THE KING (BOYLAN) *v.* JUSTICES OF LONDONDERRY.

Gibson, J.

the magistrate's discretion without strict proof. If not limited to the peculiar nature of the case before the Court, such *dicta* would seem opposed to principle and authority. If on special application for the peace sufficient grounds must appear, the same rule must apply to orders made without special application. The argument that an order cannot be supposed to be made without just cause, and that the Court should assume that the Justices had good reason for acting, is opposed to the reasoning in *Reg.* v. *Dunn* (1), and if correct would leave the person affected at the mercy of arbitrary discretion or discretion unsupported by proof.

If an application for sureties was on its face insufficient and the magistrates bound over, on the present argument it might be said that there might have been evidence of facts or gestures outside the recorded complaint, and that the order might be referred to such possible facts—a view quite opposed to authority.

A conclusive test is supplied by asking the question, what would have been the form of warrant if the defendant had refused to give his recognizance? Unquestionably it must have shown adequate grounds. A man cannot be imprisoned by any inferior tribunal without a written adjudication showing jurisdiction.

Rudyard's Case (2) (cited by Lord Denman in *Dunn's Case* (1)) decided in 1670, is decisive against Justices being entrusted with absolute discretion. That case depended on Rudyard's personal examination on which the Justices who heard it acted. The Court was equally divided, but the judgment of Tyrrel, J., is clear law. The warrant or order must certify the facts, to enable the Court to judge of their sufficiency. A general order binding over would be unquestionably bad: see *Chambers' Case* (3), quoted in *Rudyard's Case* (2), and *Lawson's Case* (4). The *Derry Case* (5), is to the same effect. There the local Justices who best knew local conditions were over-ruled on the facts by this Court.

(1) 12 A. & E., at pp. 617, 619.
(2) 2 Ventris, 22.
(3) Cro. Ch. p. 133.
(4) *Ibid.*, p. 507.
(5) 28 L. R. Ir. 440.

In *Wilkins' Case* (1), where the prosecutor without any complaint was required to enter into and did enter into a recognizance, the Court dealt with the case on the footing that if the special order was not sufficient it must be quashed. The Petty Sessions Act form contemplates an order, and whether such order is founded on a complaint, or on facts proved before the Court, a legal basis must appear.

The dismissal of a case for assault on the merits or otherwise, does not support as a legal consequence the inference that the defendant's conduct demanded a precautionary order against future misbehaviour. That the Justices make an order binding over, shows that they thought it right to do so, but unless the foundation on which they proceed is disclosed, the order cannot stand. Otherwise every order binding over, whether on complaint or not, would carry its own justification; it might be referred to possible facts or evidence which might have been before the Justices.

In *Davis' Case* (2), it was sworn that there was no evidence to affect the defendant. If this was so, according to the *Derry Case* (3), accepted in *Mahony's Case* (4), there was no jurisdiction to make the order, even if it had been good on its face. I think the decision in *Davis' Case* (2) is largely influenced by the defendant having entered into the recognizance—though of course he was in strict law entitled to apply to have it quashed if it had been illegally required. No authorities were cited in *Davis' Case* (2), and it is impossible to construe the remarks attributed to the Judges as intended to over-rule the principle laid down in *Rudyard's Case* (5), *Dunn's Case* (6), and other authorities, that the Justices' determination must disclose sufficient grounds to enable this Court to judge. In *R.* v. *Tregarthen* (7), where the defendant gave security in a case *inter partes*, there was evidence; and Parke, J., expressly makes sufficient information on oath a condition of jurisdiction.

(1) [1907] 2 K. B. 380.
(2) 24 L. T. (N. S.) 547.
(3) 28 L. R. Ir. 440.
(4) [1910] 2 I. R. 695.
(5) 2 Ventris, 22.
(6) 12 A. & E. 599.
(7) 5 B. & Ad. 680.

K. B. Div. 1912.

THE KING (BOYLAN) *v.* JUSTICES OF LONDONDERRY.

Gibson, J.

2. The next question is whether the record is in fact sufficient in form. The prosecutor was Head Constable Doherty; the complaint was for assault on two Begleys, *and* to show cause why defendant should not be bound to be of the peace and of good behaviour. Apparently witnesses were heard on both sides as in an ordinary prosecution. Considered as an assault summons there were two objections: the summons did not allege refusal by the Begleys to prosecute; and the assault having arisen out of a dispute as to title, there was no jurisdiction in the magistrates to decide such complaint: *Reg.* v. *Pearson* (1).

Hence it is argued that the summons must be read, in order to make it valid, as confined to peace and good behaviour, and as not asking for any determination on the assault. The record, however, must be construed as it stands. The necessity of alleging refusal by the party aggrieved has been often overlooked, as is illustrated by many cases. The complaint as recorded purports to require an adjudication on the assault which there was no jurisdiction to give. No determination on that point was pronounced, but the defendant was bound over. There was, in fact, on the evidence good reason for making the order, but does the record disclose it? I think not. The defendant being present, even without any special application he might on proper evidence have been bound over—but the order must contain justifying grounds. The subsequent consequential warrant for imprisonment would depend on the validity of the order.

Mahon's Case (2) was relied on for defendant. Unfortunately the case was only argued on one side. As it stands, it is rather an authority for the applicant. But I incline to the opinion that an assault arising out of a title dispute might justify magisterial action: *Reg.* v. *Mallinson* (3). If an assault developed into an affray, it would certainly warrant an order.

Where only an application for the peace is intended the complaint should so commence and then give the grounds; it is incorrect to aver a positive charge, and then, as if an

(1) L. R. 5 Q. B. 237.
(2) 41 Ir. L. T. 225.
(3) 16 Q. B., at p. 373.

independent matter, to ask for security. In the present case the application for security is general and does not purport in terms to be consequential from the assault. A charge of assault, not decided, does not in itself justify an order binding over. The reasons for that exceptional course must be stated, as I have already explained.

3. The last point was that on the merits the defendant was properly bound over, and that in its discretion the Court should not interfere. But if the order is on its face invalid and may result in imprisonment, we cannot refuse to quash. If the defendant was imprisoned, he must be at once discharged on *habeas corpus*; it is in the interest of all that the invalid order should at once be removed out of the way.

Solicitor for the prosecutor: *Robert Horner.*
Solicitor for the Crown: *Malachy Kelly.*

J. G. T.

K. B. Div. 1912. April 25, 26, 29. May 17.

DARIUS RYAN *v.* THE COUNTY COUNCIL OF THE COUNTY TIPPERARY, NORTH RIDING.

(1911. No. 4958.)

Local authority—Liability, when interfering with road for the purposes of repair—Portion left open for use of public to be kept reasonably safe—Non-feasance while executing repairs.

A County Council who were under an obligation to maintain and repair the public roads within their jurisdiction, were engaged in repairing a portion of one of such roads, and for this purpose employed a steam-roller to roll down and level in the new metal; these repairing operations were confined to a portion half the width of the road, the other half being left open for public traffic. A man driving in a donkey-cart along the half so left open, proceeding in the same direction as the engine, and overtaking it, was jerked from his seat by the wheel of his cart colliding with a large stone lying in the water-table close to the grass margin on the side of the road opposite to the engine; the jerk threw the man into the road and under the wheels of the engine, where he received injuries from which he died; the stone (which had probably fallen off the fence bounding the road) had, to the knowledge of the Council's workmen, been in that position for two or three days previous to the accident. In an action under Lord Campbell's Act, the jury found that the defendants were negligent in omitting to remove the stone, and that there was no contributory negligence on the part of the plaintiff.

Held (*per* Palles, C.B., and Wright, J., Kenny, J., *diss.*), that the act of interfering with the road imposed an obligation on the County Council to take care that the remaining portion left open for public use was reasonably fit and safe for such purpose, and that the Council were therefore liable in damages.

New Trial Motion.

The County Council of County Tipperary, North Riding, were engaged repairing a road within their county, which it was their duty to maintain and keep in proper repair. In performance of such duty they employed a steam-roller to crush down and level in the new metal placed on the road, the work being carried out by using the engine on a stretch half the width of the road, and

(1) Before Palles, C.B., Kenny and Wright, JJ.

leaving the other half open for traffic; a notice was placed at either end of the stretch warning the public to "Beware of the steam-roller." While engaged in this work a man named John Ryan, driving in a donkey-cart, came along the stretch in the space left for traffic, proceeding in the same direction as the engine; when just past the engine the opposite wheel of the donkey-cart struck against a large stone lying in the water-table close to the grass margin of the road; this stone had, to the knowledge of the defendants' workmen, been lying there for two or three days previous. The impact with the stone tilted up the cart, and threw the driver out in front of the moving engine, where he was run over and killed.

The father of the deceased man brought an action under Lord Campbell's Act to recover damages occasioned to him as father of John Ryan, deceased, by the negligence and breach of duty of the defendants, their agents or servants, which occasioned the death of the said John Ryan. The statement of claim was in the following terms:—

"1. The plaintiff is a farmer residing at Gurthnadelawn, Nenagh, in the county of Tipperary, and he brings this action for the benefit of himself as sole parent of the said John Ryan, deceased.

"2. The plaintiff has suffered damage from the negligence and breach of duty of the defendants, their agents or servants, under the circumstances hereinafter-mentioned.

"3. The defendants are the County Council of the North Riding of the County of Tipperary, and as such liable for the maintenance and repair of the roads (including the road hereinafter mentioned) in their said county.

"4. On the 25th day of January, 1911, the defendants, in performance of their duty, and in discharge of their liability as aforesaid, were by their servants or agents repairing the public highway at Ardcroney, being one of the roads in said county, and for the purpose of such repairs then used a steam-roller.

"5. On the said day the said John Ryan was lawfully driving a donkey-cart along the said road, when by reason of the negligence of the defendants, their agents or servants, in placing and allowing to remain a large stone on the said road, the said John Ryan was

K. B. Div. 1912.

RYAN v. TIPPERARY (N. R.) CO. COUNCIL.

thrown from his cart, and fell under the said steam-roller, which passed over and killed him."

The particulars attached to the statement of claim set out that the plaintiff, Darius Ryan, was the sole surviving parent of the deceased, John Ryan, who was a bachelor earning about 25*s*. a week, and was the sole support of the plaintiff.

The defendants delivered the following defence :—

"1. The defendants deny that they, or their agents or servants, or any of them, were or was guilty of the alleged or any negligence or breach of duty.

"2. The defendants do not admit that there was a large stone on the said road, or that the said John Ryan, deceased, was thrown from his cart, or fell under the defendants' steam-roller, or was killed by reason or in consequence of any of the acts or matters complained of. The said John Ryan, deceased, was thrown from his cart, and fell under the said steam-roller and was killed by inevitable accident.

"3. There was contributory negligence on the part of the said John Ryan, deceased.

"4. Admitting for the purpose of the defence pleaded in this paragraph, but not further or otherwise, that the plaintiff is a person by or for whose benefit this action can be brought, the defendants say that the plaintiff was neither wholly nor partially dependent upon the earnings of the said John Ryan, deceased, and has not suffered any pecuniary loss or damage from the death of the said John Ryan, deceased.

"5. The defendants do not admit that the earnings of the said John Ryan, deceased, were of the amount alleged in the particulars."

The plaintiff, in his reply, joined issue, and pleaded further that if there was any contributory negligence on the part of the deceased (which he denied) the defendants could, nevertheless, by the exercise of ordinary care, have avoided causing the injuries complained of.

At the trial the plaintiff's statement of claim was amended by adding as follows :—

"The defendants are the Highway Authority for the North Riding of the County of Tipperary, and on the 25th day of January,

1911, and for some days prior thereto were steam-rolling and otherwise repairing the highway at Ardcroney, within said Riding and County. On the 29th day of January, 1911, and for at least some days prior thereto, a large stone was and remained on that portion of the said highway, which was then under repair by the defendants, and was an obstruction to the said highway, and might be a source of danger to persons lawfully using the said highway, and the defendants knew, or with reasonable care ought to have known, that the said stone was upon the said highway, and was or might be a source of danger to persons lawfully using the same. The defendants, notwithstanding, did not remove the said stone, nor did they take any precautions in reference thereto, but, on the contrary, in the course of such steam-rolling and repairing as aforesaid, they narrowed the said highway so as to compel vehicles using the same to keep to the side of the said highway, whereon the said stone was and remained, by reason whereof the portion of the said highway available for such vehicles became and was unsafe and dangerous for such vehicles, and by reason of the premises the said John Ryan, while lawfully using the said highway, was thrown from his cart and killed."

The action was tried before Dodd, J., and a common jury of the City of Dublin, on the 31st of January, and 1st day of February, 1912, when the following questions were submitted to and answered by the jury:

1. Was the roadway at the time of the injury in fact dangerous to persons with vehicles using the roadway? Answer—"Yes."

2. Were the defendants negligent—(*a*) In placing the stone on the roadway? Answer—"No"; (*b*) In omitting to remove it from the roadway? Answer—"Yes"; (*c*) In not taking proper precautions while they were repairing the road to prevent injury to persons (with vehicles) who might be proceeding upon the roadway? Answer—"Yes"; (*d*) If you answer yes, what precautions did they omit? Answer—"In not removing the stone."

3. Did the deceased, by his own want of ordinary care and caution, so directly contribute to the happening of the occurrence that but for such want of ordinary care and caution the occurrence would not have happened? Answer—"No."

4. Damages? Answer—"£90."

The Judge gave judgment for the plaintiff for £90 and costs.

K. B. Div. 1912. RYAN v. TIPPERARY (N. R.) Co. COUNCIL.

The defendants now moved for an order that the verdict entered for the plaintiff be set aside, and in lieu thereof judgment be entered for the defendants, or in the alternative for a new trial, upon the following grounds—(*a*) That there was no evidence proper to be submitted to the jury that the defendants were guilty of any act of misfeasance or actionable negligence, and that the learned Judge should have directed the jury accordingly.

(*b*) That the learned Judge misdirected the jury in directing them that they would be at liberty to find upon the evidence that, the width of the roadway available for vehicular traffic having been reduced by the defendants' operations in connexion with the repair of the said roadway, it was the duty of the defendants to have removed the stone in question from the said roadway, if the removal thereof was in the opinion of the jury a proper precaution for preventing injury to persons (with vehicles) who might be proceeding upon the said roadway.

(*c*) That the findings of the jury that the defendants were negligent in omitting to remove the said stone from the said roadway, and in not taking proper precautions (by removing the said stone) while they were repairing the said roadway, were respectively against the evidence and the weight of the evidence.

(*d*) That the finding of the jury that the deceased in the pleadings mentioned did not by his own want of ordinary care and caution so directly contribute to the happening of the occurrence, that but for such want of ordinary care and caution the occurrence would not have happened, was against the evidence and the weight of the evidence.

The following is a copy of the Judge's notes of the trial of the action :—

"Action of negligence causing death of plaintiff's son.

"1st Witness, Patrick Ryan—'Brother of deceased. Deceased was thirty-one years old. He was a carpenter. I taught him. He worked at home. I worked out. I made model. Model made to scale. I was shown by John Hogan positions. These are marked—Roller, 6 feet 9 inches; donkey-cart, 4 feet 5 inches, board across. Width of road, 18 feet 3 inches from selvage to selvage. Selvage right side, 21 inches wide, 9 inches high. Sloping selvage left hand side, 10 inches wide.'

"2nd Witness, Darius Ryan, plaintiff—'Father of John, deceased. Near Nenagh, 20 acres farm. Was carpenter. John died 28th January, 1911, aged thirty-one. My wife died four years ago. Pat works for himself. Thomas tills the ground. Two unmarried daughters, Bridget and Annie. Deceased earned about 30*s.* a week. He gave it to me, except what he kept for tobacco. About 25*s.* a week net. He had to be kept. He had to buy clothes once a year. He would keep back some of his wages to pay.'

"Cross-examined—'Pat and John were both living with me. They would make 35*s.* a week each. They would make 25*s.* each in bad times. My two boys were never idle—carts, cars, wheels, and every kind of thing. They were never idle. They had constant work.'

"3rd Witness, Michael Smith—'National school teacher, Ardcroney, 28th January, 4 o'clock, afternoon, was coming out of my school. My house is about 60 yards from the scene. I turned in Nenagh direction. Went to Martin Mulcahy, who was filling stones from a heap on the side of the road. This heap was on the other side of my house from the scene. It would be 20 or 22 yards. I turned to speak to Mulcahy and looked in the opposite direction. I saw the boy topple off the donkey-cart. I hastened down. The car was raised—right-hand wheel raised. I saw him make an effort to save himself, only for that his head would have been where his heels were. His head would have gone in. I met Hogan. I met the donkey and cart. It had righted itself, and was coming along to me. Steam-roller stationary. Deceased was there just out from the large roller. He had been taken out. Legs broken (cause of death admitted). Deceased was perfectly sober. I observed ground. I noticed trail of wheel of donkey's cart against a large block of stone 9 or 10 inches diameter, oblong shape. Stone pressed up against margin of road. There was a mark of the wheel as far as the stone. Stone had been moved by wheel of car 10 or 12 inches. The place from where the stone started was a few inches out from selvage. Model correct in this respect. Steam-roller was practically on centre of road.'

"Cross-examined by Brown.

"4th Witness, James Costello, Ardcroney—'Was cutting in

K. B. Div. 1912.

RYAN v. TIPPERARY (N. R.) CO. COUNCIL.

his yard 400 yards from the accident. Did not see him fall. I saw Gleeson. He usually drives roller. Gleeson was scraping blood off the road. John was in Martin Mulcahy's kitchen. They were repairing this portion of the road on 25th January. They were at work two days before. I saw Gleeson working there that day and two days before. He pointed out stone that was at that time on top of the bank. He said the stone was the cause, that the wheel of the car struck against that stone. I examined road. I saw the skid. It was about 2 feet. Skid went inwards towards the bank. Skid began about 3 inches from selvage. Saw track of wheel coming up to that. It was a sandstone—clean, rolling stone about 12 inches long by 9 inches diameter. It was something bigger than my head.'

"Cross-examined by Gibson.

"5th Witness, George Cochrane—'In company with last witness. Roller was coming up to work in Nenagh direction. Stone big as one's head. Saw skid mark. Saw track of wheel.'

"Cross-examined by Gibson—'There was difficulty in seeing stone. Stone was, I think, of the same kind as macadam.'

"6th Witness, Martin Mulcahy, Ardcroney—'I had been working for Council, 25th January. The Council was laying road material. They were two or three days at steam-roller. They had before 25th January brought out stones from a quarry. I was engaged at that work. I was carting from Borrisokane side. This place in direction of Nenagh. I was putting them on the road to be broken up. The county employs me to break them by the ton. I drew stones from quarry for steam-roller at time of occurrence, but these stones had been prepared in quarry. The stones had to go through a process. It was the screened stones I took—1½ inch mesh; stone was in channel when I saw it. I saw it two days before the accident. It was a big round sandstone.'

"Cross-examined—I live close to place. It was to my kitchen the man was brought. One side of the road is bank breasted with stone. It is on the other side of the road. There are in that bank some out of the quarry.'

"7th Witness, John Hogan—'In the employment of County Council. Had been rolling this place before the accident. The engine was going to another place. This particular portion of the

road had been finished. It had been finished immediately before this. We had been up and down a couple of days before this in the course of our business. The cooking van and portion of the apparatus had been up on the Nenagh side the day of the accident. The steam-roller had come up 20 or 30 yards. We were going backwards and forwards for two days before accident. I was working behind the steam-roller throwing in stuff with a shovel. We do sweep the stuff off the road after the steam-roller has done its work. Mud we sweep into the ditch. We brush in the stuff off the road. The road in front of the steam-roller had been watered before this. It was actually rolling in, at the time, the road that had been prepared for it. I saw deceased coming up. He spoke to me, passed me. I know the water-table. I saw a stone there at the time of the accident—a big stone, as big as a man's head. It was 3 or 4 inches from selvage. The stone skidded. He got a jerk. He turned head over heels. The cart struck against the stone. It raised a little the wheel some distance off the ground. He swerved, half recovered, turned head over heels. Map accurate.'

"Cross-examined by Brown—'It was a shovel I was using. The roller was rolling the road at the time. Everybody was at liberty to go along the roadway. We were still working at this portion of the road at the time, repairing the road.'

"8th Witness, Michael Cahill, C.E., map.—'Measurements correct—metalled part of the road 18 feet 3 inches, roller as pointed out by Hogan 4 feet 3 inches from left side.' That left 7 feet 3 inches, on right side. Stone 3 inches out of roadway."

Mr. Brown asks for direction:—

"(1.) There is no evidence that the defendants placed the stone there.

"(2.) No evidence that they allowed it to remain there.

"(3.) At most it is non-feasance.

"(4.) There was coercive evidence of contributory negligence.

"(5.) That there was no legal pecuniary loss.'

"Brown states defendants' case:—

"1st Witness, Moynan—'County surveyor twenty years. Roads repaired under direct labour system, ordinary patches for

K. B. Div. 1912. RYAN v. TIPPERARY (N. R.) Co. COUNCIL.

metalling; if I have a spare engine, I run the engine over. I stopped the engine to roll the patches. We put on limestone gravel, no stone larger than a hen's egg, largest stone would pass through a 2-inch mesh. I had seen the road shortly before —I had seen it after the accident, Friday after the accident. A month back, I made measurements, road 18 feet metalled. Fence at right side of road has a grass margin of 2 feet wide, at the other side a slope. It is a sod fence—most of it faced with round stones. Position of engine pointed out by driver of engine. Photos put in. Donkey-cart 4 feet wide, 4 feet 6 inches at widest. Engine 6 feet at widest. Donoghue pointed out donkey-cart. On right side 9 feet 3 inches, room, on left-hand side between 3 or 4 feet.'

"Cross-examined by Powell.—'22nd January was the first time Donoghue pointed out engine. I allow 9 feet 3 inches, as against Mr. Cahill's 7 feet 3 inches, for roadway between engine and margin of road. We place engine 2 feet 9 inches from left-hand side. Mr. Cahill places it at 4 feet 3 inches.'

"2nd Witness, Mr. Gill, C.E.—'Assistant county surveyor thirty years; regulations — printed regulations — put in. The stone was not used in carrying out the work. Could not be of any service in carrying out the work.'

"3rd Witness, Pat. Donoghue.—'Employment of County Council, engine man. I was in charge. Pat Gleeson and I. I was on engine. I was driving engine for about two hours before accident. We had been three or four days at this job. Patch-work, small stones, seemed about size of a hen's egg. I was driving. I did not see the deceased till he fell. I was driving at about one and a-half. We were going up and down the bit of patch. I saw Gleeson take measurements. Donkey-cart would be about 4 feet from me. I stopped the engine in about ½ foot. His legs fell under the engine.'

"4th Witness, Pat Gleeson.—'Driver of engine. Donoghue driver and assistant. I was up in front of the engine 50 yards. I did not see the man till he was on the ground. Engine had been moved. Head towards ditch, feet towards engine. I stepped the road. I made it 9 feet from roller to grass. I stepped road 18 feet. I noticed stone at edge of grass margin. It was a largish stone. I had not noticed stone.'

"Cross-examined by O'Connor.—'If I had seen the stone there, I would have thought it a wrong thing to leave it there.'

"Defendants close.

"Defendants' counsel repeat their requisitions. Brown admitted that accident occurred while the road was under repair. I thought that brought the case within the authority of *Clements* v. *The Tyrone Co. Council* (1). There was, however, no evidence as to how the stone got there, and Mr. Brown relied on this, that it was not part of the repairing. I formulated the questions so as to raise for each side as far as possible the questions of law put forward on behalf of each. As regards the one I left to the jury to answer other than 'Yes or No,' I wish to say that it was, I think, in connexion with part of my charge they so framed their answer. I had pointed out that it was not the stone that was complained of, it was not the engine was complained of, it was the combination of the two. If the engine was to be used as it was being used, the stone, it was said, should not be there. If the stone was to be allowed to remain, the engine should not be used where it was. It was the combination, it was alleged, made the road unsafe—and I make no doubt what the jury meant was, that the engine was rightly used, but, to make it right, the stone should have been removed. On reflection I think it was hardly fair to ask the jury to formulate a proposition that I have some difficulty in framing myself.

"I gave judgment according to the answers.

"W. H. DODD."

Carrigan, K.C. (*S. L. Brown, K.C.*, and *W. G. Gibson, K.C.*, with him), for the defendants:—

A local authority cannot be held liable in damages for injuries arising from non-feasance: *Russell* v. *The Men of Devon* (2); *Cowley* v. *Newmarket Local Board* (3); the defendant Council had not interfered in any way with that half of the road upon which the accident occurred—this is mere non-feasance; and on

(1) [1905] 2 I. R. 415.
(2) 2 Term Rep. 667.
(3) [1892] A. C. 345.

K. B. Div. 1912.

RYAN v. TIPPERARY (N. R.) CO. COUNCIL.

the facts, the case is just the same as if no repairing had been in progress, and as if the deceased man had been passing a traction engine belonging to any member of the public at that particular spot; he was passing on his proper side of the road; the Council's engine was lawfully on the road, and in fact executing work which it was their duty to perform: *Clements* v. *Tyrone County Council* (1); *Penny* v. *Wimbledon Urban District Council* (2); *M'Clelland* v. *Manchester Corporation* (3). [Counsel also referred to *Harbinson* v. *Armagh County Council* (4); *Hill* v. *Tottenham Urban District Council* (5).] There is clear evidence of contributory negligence; it was broad day-light; the stone was as big as a man's head, and could easily be seen; there is no evidence that the animal was nervous or restive, or difficult to manage, but there is evidence practically the other way, to the effect that after the cart righted the donkey went on along the road.

Powell, K.C., and *James O'Conner, K.C.* (with them, *D. J. O'Brien*), contra:—

The question is, what is the measure of the duty thrown on the County Council; we do not argue that in the ordinary case a County Council is liable in case of accident for non-feasance; but when they interfere with the free passage of the road, a new duty is thrown on them, and that duty is not limited to misfeasance; when there is an interference with a public highway, which would be unlawful unless it were authorized by the proper authority, the party interfering must take due care to put the available part of the road safe for passengers and persons lawfully passing along and using it; it was a negligent carrying out of the work in this case to have left the dangerous stone on the only part of the highway available. *The Mayor of Shoreditch* v. *Bull* (6) carries the plaintiff's case the full length; we adopt the judgment of Mr. Justice Lush, in *M'Clelland* v. *Manchester Corporation* (3), as our argument. [Counsel also referred to

(1) [1905] 2 I. R. 415, 542.
(2) [1898] 2 Q. B. D. 212.
(3) [1912] 1 K. B. 118.
(4) [1902] 2 I. R. 538.
(5) 15 T. L. R. 53, and 79 L. T. (N. S.) 495.
(6) 68 J. P. 415; 20 T. L. R. 254; 90 L. T. (N. S.) 210.

Halsbury's Laws of England, vol. xvi, p. 134.] On the question of contributory negligence, there is ample evidence to sustain the finding of the jury; there is the noise of these engines, and the known difficulty in handling animals when attempting to pass them; moreover the engine was almost in the middle of the road and the space left to the deceased was therefore, very narrow, so that he was practically forced into the place where this dangerous stone was.

W. G. Gibson, K.C., in reply:—

Cases like *Bull's Case* (1) are clearly distinguishable from the present. In it there was actual misfeasance by the local authority, and where there is a misfeasance they are liable for everything that follows from it: *Maguire* v. *Corporation of Liverpool* (2). The present defendants have committed no misfeasance of any kind.

WRIGHT, J.:— May 17.

[His Lordship, having referred to the nature of the action and to the pleadings, proceeded]—

The facts of the case, so far as they are material, may be stated in a few sentences: The defendants, the County Council, are the road authority, and were occupied doing repairs to a certain road within their county. Stones had been prepared for the purpose of being laid on the road in question, and the County Council, by their men, were engaged in getting these stones into proper position, and were using the steam-roller for the purpose of levelling them down. On the date of the accident they were actually engaged in this work of repair, for it is expressly stated in the report of the learned Judge, Mr. Justice Dodd, that they were still engaged in the process of repairing the road. The accident occurred in a very peculiar way. The width of the road was 18 feet 3 inches, and the width of the steam-roller was 6½ feet. The roller was almost in the middle of the road, with a space of about 4½ feet on the left-hand side, which left a space of about

(1) 68 J. P. 415; 20 T. L. R. 254; 90 L. T. (N. S.) 210.

(2) [1905] 1 K. B. 767, at p. 781.

K. B. Div. 1912. RYAN v. TIPPERARY (N. R.) CO. COUNCIL. Wright, J.

7 feet 3 inches on the right-hand side. The evidence of the Surveyor of the County Council makes the space at the left-hand side of the road 2½ feet, which, if correct, would make the space on the right-hand side about 9 feet 3 inches. The unfortunate man, John Ryan, was coming up behind this steam-roller, and going in the same direction; he was, accordingly, passing along the wider space, and on his right side. How the accident actually occurred is not very clear from the evidence. A great many witnesses were examined, yet I can find only one witness who saw and purports to describe how the occurrence actually took place. But really when his evidence is examined, it will be found that he does not give any details of the actual accident. He says that he saw the accident; that the cart hit some obstruction, was tilted over, and the boy fell out. But, further than this, he does not tell us how it occurred. His evidence is in these terms :—

[His Lordship read the evidence of Michael Smith]—

There is no other account given by anyone who saw the accident. The only other fact that it is necessary for me to state is that, in this clear space, through which the deceased man was passing, there was a large stone, as big as a man's head, which anyone could see, lying near the edge of the grass margin, and it was obvious from the mark on the stone that the right wheel of the cart must have struck up against it, and gone wholly or partly over it. That stone had been there for some days; it had evidently fallen off the fence; it had been seen by the Council's men; it was a big stone, and it was allowed to remain there; and, undoubtedly, it was the cause of the accident.

In my opinion, this is a state of facts that is very peculiar. The County Council were performing a legitimate act—in fact, a duty they owed to the public, namely, repairing the road. As far as I can see, there is no wrongful act charged against them in the execution of that work. Their steam-roller was going at about 1½ miles an hour; they were properly repairing the road, and there was nothing wrongful or tortious that would, of itself, give rise to a cause of action.

If anything is clearly settled, it is that a body, like a County Council, is not liable for non-feasance. That proposition is

established by authorities from *Russell* v. *The Men of Devon* (1), down to *Cowley* v. *Newmarket Local Board* (2), and *Harbinson* v. *Armagh County Council* (3).

But, then, comes the other element in the case, and, in my opinion, it is a big element. Does it alter the liability of the County Council if, while they are rightfully engaged in repairing one part of a highway, that portion which they have left for the accommodation of the public is not in a reasonably safe condition for persons lawfully using it?

If it were not for some recent authorities, I might have come to a different conclusion. I now proceed to consider these authorities.

The first case that I need refer to is *Hill* v. *Tottenham Urban District Council* (4). That case has been followed by the Court of Appeal in this country in *Clements* v. *Tyrone County Council* (5). Lord Justice FitzGibbon quotes with approval the following passage from the judgment of Bruce, J., in *Hill's Case* (4). I read the quotation from page 546 of the report of *Clements' Case* (5):—

"Where a public body takes upon itself the making up of a road, such work being of itself, unless carefully done, likely to be dangerous to the public, a duty is cast upon such public body to see that no dangerous obstructions are allowed to exist to passengers passing along the road."

Then the quotation goes on to deal with a matter that we are not concerned with in the present case, namely, that a public body cannot evade that duty by delegating it to a contractor. Then the quotation from the judgment of Mr. Justice Bruce continues:—

"It seems to me that the determination of the case depends upon the question and the answer to the question, Does the making up of a road cast upon the authority making it up the duty of taking care that no obstruction—at least, no dangerous obstruction—shall be offered to the public? It seems to me that the answer to that question must be 'Yes.' You cannot make

(1) 2 T. R. 667.
(2) [1892] A. C. 345.
(3) [1902] 2 I. R. 538.
(4) 79 L. T. (N. S.) 495.
(5) [1905] 2 I. R. 415, 542.

K. B. Div. 1912.

RYAN v. TIPPERARY (N. R.) CO. COUNCIL.

Wright, J.

up a road without having imposed on you the duty of taking care that in the work of making up the road no danger or injury shall be offered to the public. It is quite clear that the moment you begin to alter a road, or break it up, or do anything to the surface of the road, unless it is carefully done, there must be danger to the public. Therefore, when the local boards take upon themselves the making of the road, there is a duty imposed on them of taking care that no dangerous obstructions are allowed to exist to passengers passing along the road."

Lord Justice Holmes, in his judgment in the same case, says (at page 550):—

"I have carefully considered these authorities, and to repeat what has been already done so fully and clearly would, in my opinion, be 'wasteful and ridiculous excess.' It is, I believe, now well settled that if a corporate body is given authority by statute to interfere with, or to do any work on, a public highway, there is implied, as incidental to the exercise of such authority, an obligation to take due care that such action or work on their part will not be a source of danger to the public lawfully using the highway."

That last sentence appears to me to have considerable bearing on this case, namely, that there is "as incidental to the exercise of their authority an obligation to take due care that such action or work on their part will not be a source of danger to the public lawfully using the highway."

I pass on now to the case on which Mr. Powell, leading counsel for the plaintiff, mainly, and, I think, rightly, relies—*The Mayor of Shoredich* v. *Bull* (1). That case comes nearer the present case than any that have been quoted before us. I will read the head-note in the case:—

"The defendants, who were the highway and sanitary authority, dug a trench along a road under their control, for the purpose of laying a sewer. When the sewer was laid, they filled in the trench and opened the road for traffic. About a week after the road was thrown open, the plaintiff was driving along in a cab; the cab-driver found that the part of the road where the

(1) 68 J. P. 415.

trench had been filled in was soft; he crossed to the off-side to avoid that danger, and ran into a heap of rubbish which had been deposited by a wrongdoer upon that side of the road, with the result that the cab was overturned, and plaintiff suffered injuries. The defendants knew that the heap of rubbish had been deposited upon the road. The jury found that at the time of the accident the part of the road that had been filled in was dangerous for traffic.

"*Held*, affirming the Court of Appeal, that the defendants were liable on the ground that they were guilty of misfeasance in throwing open the road when it was not fit for traffic, and that that misfeasance was the cause of the accident."

The rubbish was put there without their permission, but they knew it was there. According to the findings of the jury, the driver was justified in passing over to the other side, and there he collided or drove up against the rubbish which had not been put there by the Council, but which they had allowed to remain there. The judgment of Lord Halsbury is fairly fully reported, and it is quite clear from reading his judgment that he thought that certain cases of non-feasance had gone too far, though he himself was party to some of them. At the commencement of his judgment, Lord Halsbury says:—

"When the question is raised in a direct form, it may be worth while to consider whether or not that which has been described as an act of non-feasance in several of the cases in which that proposition has been applied—I think a little too widely—may not be considered misfeasance. But it is enough for the present case to say that according to the authorities there is enough here to show that the act which was being done was an alteration of the normal condition of the road, and if there was anything wrong, either in the mode of carrying out the work, or in the time which was allowed to elapse between the opening of the road and its becoming formed, or if in any other way the thing that was being done was negligently done, or if there was evidence for the jury that it was negligently done within any of the decisions which have been cited to us, it was an act of misfeasance for which the local or road authority, under whose authority the thing was done, was responsible."

K. B. Div. 1912.

RYAN v. TIPPERARY (N. R.) Co. COUNCIL.

Wright, J.

The question that I am considering in this case, and that I have to decide, is this: Does the conjunction of those two facts—(1) the act of lawfully repairing the road, which was an act of feasance, and (2) allowing the stone to remain on the road, amount to misfeasance? I go back to the judgment of Lord Halsbury, and I find this passage:—

"The moment the structure of the road is interfered with, it comes within the ambit of the operation commenced by the person who is entitled to interfere with the structure of the road; then, until that road is restored into the condition in which it was before that alteration of its structure began, it seems to me the person who interfered with it is responsible for misfeasance."

And, again, towards the end of the judgment:—

"Under these circumstances it becomes an ordinary case of interference with the road, the non-return of it into its normal condition, and an accident happening in the ordinary course of events which, but for the alteration in the normal condition of the road, would not have happened. That seems to me, therefore, to be a sufficient chain of events to show that the person who interfered with the normal condition of the road is responsible for it until its return to a safe condition. It was not restored to the normal condition when the accident occurred, and, therefore, I think that the plaintiff is entitled to maintain his verdict."

And Lord Macnaghten, whose judgment is given in a few lines, took the same view. He says:—

"Notwithstanding the able arguments we have heard this morning, I think that what was done must be regarded as one operation and by one body. So regarding it, I think that there was more than non-feasance. There was misfeasance."

Lord Lindley, in concurring, says:—

"There were three breaches of duty, so far as I can make out, or, at all events, there were three acts done, not merely omissions. There was breaking up the road and putting it into such a state that it was not fit for traffic; there was restoring the road and not restoring it so as to be fit for traffic; and there was leaving the cartload of rubbish there, which it was the duty of some one on

the part of the defendants to clear away (I do not say an actionable duty), and that was not done. Three wrongs do not make one right. It is more than omission. It is not as if they left the road alone; they did nothing of the sort. They first began by putting it out of a proper state of repair, and they never put it back into a proper state of repair."

The principle of that case governs the present. And taking the fact that the County Council were still engaged in the act of repairing, and that the large stone was there to their knowledge, I am of opinion that what occurred here was misfeasance; and, therefore, I think the verdict was right.

But there is another question that goes to the whole verdict. Mr. Brown applied for a direction on the ground of contributory negligence, namely, that the plaintiff, in proving his case, had necessarily proved contributory negligence directly causing or contributing to the accident. And there is no doubt that a case can be withdrawn from a jury where this is proved. In *Slattery* v. *Dublin, Wicklow, and Wexford Railway Co.* (1), Lord Hatherley concurs in the judgment of my Lord Chief Baron on this point, and at p. 1168 of the report, in his judgment, says:—"I concur also in the opinion expressed by Chief Baron Palles that "when there is proved, as part of the plaintiff's case, or proved in the defendant's case and admitted by the plaintiff, an act of the plaintiff which *per se* amounts to negligence, and when it appears that such act caused or directly contributed to the injury, the defendant is entitled to have the case withdrawn from the jury." That is amplified by the Lord Chief Baron, in giving his judgment in *Coyle* v. *Great Northern Railway of Ireland* (2). It is only necessary that I should read one portion of the head-note:—"To justify leaving a case to the jury, notwithstanding the voluntary act of the injured person contributing to the injury of the plaintiff, all the circumstances must be such as either—(1) to make the question whether that act is negligent (either *per se* or having regard to the conduct of the defendants inducing or affecting it) a question of fact; or (2), to render reasonable an inference of fact that the defendants, by using due care, could have obviated the consequences of the plaintiff's negligence."

(1) 3 A. C. 1155. (2) 20 L. R. Ir. 409.

K. B. Div. 1912. RYAN v. TIPPERARY (N. R.) Co. COUNCIL. Wright, J.

There is no doubt whatever, having regard to these two decisions, that a Judge can withdraw a case from the jury and direct a verdict for the defendant, if contributory negligence is proved. But is there such contributory negligence proved here? I have already read the evidence of the only eye-witness as to how the accident occurred. But let me also consider the facts that must have occurred at the time. This man was sitting in the donkey-cart, which had a width of 4½ feet. He had a roadway of 7½ feet, and he was going along past the steam-roller. He could have seen the stone, for it was broad daylight, and the stone was as big as a man's head; and, according to the fifth witness examined in the case, "there was no difficulty in seeing the stone." It is perfectly plain, however, that he never saw the stone. I presume he was looking out. He was passing this steam-roller, which was making the usual noise that a steam-roller does, and he was probably trying to keep as far away from it as he could. It is obvious that he was not looking to his right side, where the stone was, but to the left where the steam-roller was. In my opinion, no Judge could have withdrawn that case from the jury.

For all these reasons I am of opinion that the verdict of the jury in favour of the plaintiff should be upheld.

KENNY, J.:—

The jury in this case have found:—

1. That the roadway in question was dangerous to persons with vehicles using it.

2. That there was negligence on the part of the defendants, the County Council, in omitting to remove the stone which was struck by the wheel of the cart; and

3. That there was no contributory negligence on the part of the deceased.

The motion before us is to set aside the verdict and judgment in favour of the plaintiff entered upon these findings, and that judgment be entered for the defendants, or that a new trial be directed. The grounds for the application are that there was no evidence of any actionable negligence on the part of the defen-

dants; that the learned Judge before whom the action was tried misdirected the jury as to the nature and extent of the defendants' duty, and that the findings of the jury as to negligence by the defendants, and the absence of contributory negligence by the deceased, were against evidence and the weight of evidence.

The facts of the case are simple in the extreme. The defendants are the road authority of the County Tipperary, and on the day of this occurrence their steam-roller was engaged in rolling ordinary patches of metalling on a high road between Nenagh and Borrisokane on which stones had been spread for its repair. The road was 18 feet 3 inches wide from grass-margin to grass-margin, and the roller at the time of the accident occupied a position towards the centre of the road. On its left-hand side there was a space of about 4 feet to 4 feet 3 inches. The roller itself is about 6 feet 9 inches in width, and thus a space of at least 7 feet 3 inches between the roller and the grass-margin at the right-hand side remained for traffic. The County Surveyor, who was examined for the defendants, gave this measurement as 9 feet 3 inches, and gave the 4 feet 3 inches at the left side as 2 feet 9 inches,—but for the purpose of the argument we have assumed 7 feet 3 inches to be the width of the right-hand space. The grass-margin is 2 feet wide at this point in front of a sod-fence fenced with large round stones. The cart which the deceased man was driving was about 4 feet 5 inches in width, so that, in ordinary circumstances and with ordinary care, it could without risk pass between the roller and the grass-margin of the road. It was proceeding in the same direction as the steam-roller, and as it proceeded to pass the latter the right-hand wheel apparently passed over—either wholly or partially—a stone some 9 or 10 inches in diameter, and oblong in form, which was lying on the road, a few inches out from the selvage, and thereby jerked the deceased off his seat in the cart, when he fell under the roller and sustained the injuries from which he died.

It is important to observe that there is no evidence that the donkey that was drawing the cart was either restive or frightened at the steam-roller, or that it shied or turned to one side away from the roller and towards the stone, and so far as one can judge it was simply a case in which the deceased, with apparently ample

K. B. Div. 1912. RYAN v. TIPPERARY (N. R.) CO. COUNCIL. Kenny, J.

room to pass the roller, drove over a stone lying near the grass-margin on his right. There is no evidence showing how the stone got there, but it is probable that it had rolled down or fallen from the fence. There is evidence that one of the defendants' men working on the road saw it lying on the road two days before the accident.

On these facts we are asked to hold that there was reasonable evidence to go to the jury of actionable negligence by the defendants. In order to do so we must be satisfied that there was a duty cast on the defendants towards the public lawfully using the highway, and that there was an *actionable* breach of that duty.

The defendants are the road authority. The deceased was a member of the travelling public entitled to use the road, and on the day in question was lawfully using it in accordance with his rights. In common with others using a public highway he was bound to exercise reasonable care and caution. The defendants, as the road authority, had a general obligation imposed on them of repairing the road, and there is no question that they were within their rights in effecting that repair in the manner deposed to, namely, by macadamising such portions of the surface of the road as required it and then passing the steam-roller over such parts. They had rights and powers in connexion with the road wider than those of the travelling public, inasmuch as they had powers of interference with the road not possessed by private individuals. They were entitled to alter the normal condition of the road, whether that condition was good or bad, and during such alteration they could exclude the public either wholly or partially. In effecting such repairs or alterations they were bound to use proper care, and if there was negligence on their part resulting in injury to an individual, such breach of duty would unquestionably be actionable. In such a case the doing of the particular work would be a feasance, and the doing of it negligently would be misfeasance, whether the act constituting the negligence was one of commission or omission. The negligence would arise in the course of the very act of interference with the road, and to render it actionable only required proof that the injury suffered was the result of it. But, in dealing with bodies such as the defendants, whose duties and rights are such as I have

described, the principles of actionable liability are subject to this qualification, which was established by the oft-cited case of *Russell* v. *The Men of Devon* (1), and repeated in every case dealing with the liabilities of road authorities, namely, that where there has been no actual interference with the road,—no negligent act done, nor any negligent omission in the course of the doing of an act of interference—in fact no feasance—but the complaint is grounded simply on non-repair,—then the source and cause of the injury is attributable to non-feasance, and no action is maintainable for the breach of duty. The principle is so well settled that I need discuss it no further, but I fully recognize this, that there has been in several of the recent decisions with reference to the liability of road authorities a tendency to place cases of alleged non-feasance in the category of cases of misfeasance, and thus render them actionable. This tendency is very noticeable in the case in the House of Lords of *The Mayor of Shoreditch* v. *Bull* (2), with which we have been so strongly pressed; and from that case and others such as *Hill* v. *The Tottenham U. D. C.* (3), *Clements' Case* (4), *Dawson* v. *The Bingley U. D. C.* (5), and *M'Clelland* v. *The Manchester Corporation* (6), the rule is plainly deducible that once the road authority proceed to interfere with the road the duty to do so properly and without negligence is at once imposed on them,—while if they abstain from interference, and possibly neglect their plain duty to repair, that neglect is not actionable, and they escape liability.

Now, in the present case, what duty was imposed on the defendants when they proceeded to repair this road. Having stated what I conceive to be their duty, I propose to consider whether there is evidence in the case of any breach of that duty that would constitute actionable misfeasance, and whether the injury to the deceased is traceable to that misfeasance. The defendants on the day of this occurrence occupied a certain portion of the width of the road, with their steam-roller. At the left-hand side it would be impossible for a cart to pass, and, therefore, it, in my opinion, became the duty of the defendants to

(1) 2 Term Rep. 667.
(2) 68 J. P. 415; 67 J. P. 37; 19 Times L. R. 64.
(3) 79 L. T. (N. S.) 495.
(4) [1905] 2 I. R. 542.
(5) [1911] 2 K. B. 149.
(6) [1912] 1 K. B. 118.

K. B. Div. 1912.

RYAN v. TIPPERARY (N. R.) CO. COUNCIL.

Kenny, J.

leave open the other side, which was to be used for traffic, in a state reasonably safe for use by the public. This duty would be imposed whether a breach of it was or was not actionable. Their duty in this respect was put by my Lord Chief Baron, in an early stage of the argument, somewhat in those words, and I think that they succinctly define the nature of the obligation. What did the defendants do? Two acts are alleged which, it is said, together constitute a breach of that duty,—the first being the placing of the steam-roller at the particular portion of the road where the accident took place, and the second, in allowing the stone to be on the road. The only act of negligence found by the jury is the non-removal of the stone—and if the steam-roller was out of the case, I think it would be impossible to contend that, although certain repairs were being done to the road, the defendants were to be liable as for misfeasance for an omission that did not arise in the course of their work. If liability was to attach in such a case, it seems to me that an intolerable burden would be imposed on road authorities, which they would be very slow to undertake—for it would mean this, that if they undertook any work, no matter how trivial, in connexion with the road—the spreading of a few stones—the scraping off of the mud—the clipping of the grass-margins—they would be liable at once for acts of non-feasance, such as the non-removal of the stone in the present case, in respect of which they hitherto had enjoyed immunity. Furthermore, for what period is the alleged interference with the road, which turns an act of non-feasance into one of misfeasance, to operate? If the road be repaired in 1910, and, therefore, interfered with, is that such a feasance as to render actionable all acts of negligence in 1912, which, but for such acts of interference, would be regarded as mere non-feasance? I hold very strongly that such cannot be the law, and that the negligence to which liability is to attach is negligence in the particular work which the road authority has undertaken. There was no negligence, actionable or non-actionable, in using the steam-roller at the place where the accident occurred. The defendants had a right to bring it to that place, and use it as they did. Was there, then, a breach of the defendants' duty resulting from the roller being where it was and the fact of there being a large stone lying on the road, which under certain

circumstances might be a source of danger? In *Bull's Case* (1), the alleged misfeasance was committed in connexion with and in the course of a specific interference with the road, by the negligent filling in of a sewer opened by the highway authority. There were three distinct breaches of duty—first, in breaking up the road, and putting it into such a state that it was not fit for traffic; secondly, in not properly restoring it; and thirdly, in leaving a heap of rubbish on the side of the road, which was the ultimate cause of the accident. But the original wrongful act was in not properly restoring the road, and it was as a result of that very omission that the accident occurred. In the Court of Appeal the liability of the defendants was based on the grounds that there was an act done that made the defendants misfeasors, and, being misfeasors, they remained such until they put back the road in a position fit for traffic. Romer, L.J., had doubts as to their decision, but did not dissent,—and Lord Halsbury, in the House of Lords, recognizing the original misfeasance and its legitimate consequences, guarded himself against going outside the facts of the particular case with which they had to deal. It seems to me that that case does not rule the present one at all. Here there is no original act of misfeasance to which the accident could be referred, and no negligence in the carrying out of a specific interference with the normal condition of the road. In the two later cases of *Dawson* v. *The Bingley Urban District Council* (2), and *M'Clelland* v. *The Manchester Corporation* (3), the accidents were the direct results of acts which were clearly misfeasances. In the former the defendants had inserted in the wall adjoining the road a misleading name-plate,—and in the other the corporation having taken over a road that had a natural ravine at one end, apparently executed works everywhere on this road except in connexion with the ravine, which they left unfenced. No case has been cited to us at all approaching the present, where there is no specific act or omission amounting to actionable misfeasance, and liability is sought to be made out by a combination of what I regard as two innocent acts. In my opinion, there

(1) 68 J. P. 415; 67 J. P. 37; 19 Times L. R. 64.

(2) [1911] 2 K. B. 149.

(3) [1912] 1 K. B. 118.

K. B. Div. 1912.

RYAN v. TIPPERARY (N. R.) Co. COUNCIL.

Kenny, J.

was no evidence of a breach of the defendants' duty to leave the road in a state reasonably safe for use.

The final ingredient in the matter of actionable liability is one involving questions of causation. If there has been an actionable disregard of a duty in this case, is the accident reasonably attributable to it? If it be not, it does not matter how important is the duty, or with what serious results the breach of it might be attended, if, in fact, the occurrence is not traceable to it. I shall assume that here there was an actionable breach of the obligation to leave the road in a state reasonably safe for the public,—was it because it was not so left that this accident happened? I would be very slow to offer an opinion that it could not be referable to it, or that it was not a danger that could have been foreseen. In *Bull's Case* (1), the accident would not have occurred had there not been a heap of rubbish on the other side of the road after the cab had for its own safety crossed in that direction to avoid a position of danger brought about by the defendants' acts. Applying that case, I am of opinion that if I be wrong in holding that there was no actionable breach of duty, the accident is sufficiently associated with that breach to complete the chain of liability.

The remaining question—that of contributory negligence—is an important one. The deceased drove his cart deliberately to the spot where he fell, and he took the risk, if any there was. He had a space of at least 7 feet 3 inches through which to pass, and there is no evidence of any difficulty whatever with the animal that was under the cart. Looking at the evidence it seems to me to be all one way, and to show such extreme carelessness on the part of the deceased, leading to the accident, as would have justified the Judge in directing for the defendants on the ground of contributory negligence; and while I think the learned Judge was quite right in leaving the question of contributory negligence to the jury—now that we have the matter here, I am of opinion that the defendants were entitled to a direction.

I therefore think that the verdict and judgment should be set aside and judgment entered for the defendants.

(1) 68 J. P. 415; 67 J. P. 37; 19 Times L. R. 64.

PALLES, C.B.:—

I agree with the judgment of my brother Wright, and with the grounds upon which he rests it; but as there is a difference of opinion between the members of the Court, I think it right to formulate my reasons in my own words.

It is undoubtedly the law, as has been affirmed by the House of Lords in *Cowley* v. *Newmarket Local Board* (1), that a road authority is not liable in damages for any injury resulting from an act of omission—or, in other words, from an act of non-feasance, as distinguished from an act of misfeasance. That distinction has been taken in a long line of cases, from the time of the Year-books, as applying to acts of local road authorities; and I, for one, have no desire to infringe upon that doctrine, or to dissent from any decided case in which it was held that the ground of action was an act of omission, as distinguished from one of commission. I leave that to the House of Lords, one eminent member of which has stated that in his opinion the principle has not been, in some of the cases, rightly applied.

I am unable, however, to regard the present case as one involving merely an act of omission; because here, on the facts stated by Mr. Justice Kenny, *something* was done to the road by the local road authority; and, therefore, if for the present, we leave out of consideration the question of causation, to which I shall come later on, this is a case of feasance, not of non-feasance. In my opinion it is well settled by the authorities—and I do not think that my brother Kenny differs from me in this—that an act of interference with the normal structure of a road is an act of feasance, which, when lawfully done by the road authority, imposes a duty. Of course, if not done under the authority of a road authority, such an act is one of trespass; and if by reason of it an injury results, undoubtedly there is a cause of action.

But a road authority has not an unlimited right to interfere with the structure of a road. The very act of interference raises a duty; and the House of Lords, in *The Shoreditch Case* (2), held that the duty which arose from the act of interference was so closely connected with that act of interference as substantially

(1) [1892] A. C. 345. (2) 68 J. P. 415.

K. B. Div. 1912. RYAN v. TIPPERARY (N. R.) CO. COUNCIL. Palles, C.B.

to make the right to interfere conditional upon the performance of the duty. That decision was, in my opinion, to this effect: "You" (the road authority) "may interfere; but the very act of interference imposes upon you a duty to use due care that the road, as well the portion of it not interfered with as the part interfered with, shall be kept in a safe condition for the public to travel along it; and therefore any injury resulting from a want of such due care, although *directly* caused by an act of non-feasance" (as, in that case, by the non-removal of the heap of rubbish), "is to be referred back to the act which caused that act of omission to be dangerous, the act of interference with the normal structure of the road; which becomes, by reason of the breach of the coincident duty to use due care, an act of misfeasance."

The existence of this liability in the case of a road authority logically follows from the judgment of our Court of Appeal in *Clements* v. *County Council of Tyrone* (1). Lord Justice FitzGibbon rests his judgment there on *Hill* v. *Tottenham Urban District Council* (2) and *Penny* v. *Wimbledon Urban District Council* (3); and nothing can be clearer than the words of Mr. Justice Bruce, in the former case, which were adopted by Lord Justice FitzGibbon. "Therefore," he says, "when a local board take upon themselves the duty of making a road, there is a duty imposed upon them to take care that no dangerous obstructions are allowed to exist to passengers who may be travelling along the road" (4); and Lord Justice Holmes says, "It is, I believe, now well settled that if a corporate body is given authority by statute to interfere with, or do any work on, a public highway, there is implied, as incidental to the exercise of such authority, an obligation to take due care that such action or work on their part will not be a source of danger to the public lawfully using the highway" (5).

The judgment of my brother Kenny involves this: That the duty so cast upon the road authority is limited to taking due care that no dangerous obstruction shall be allowed to exist on the portion of the road actually interfered with, and for that purpose

(1) [1905] 2 I. R. 546.
(2) 79 L. T. (N. S.) 495.
(3) [1898] 2 Q. B. 212.
(4) [1905] 2 I. R. at p. 546.
(5) *Ibid.* at p. 550.

reliance was placed upon the judgment of the Court of Appeal in the *Shoreditch Case* (1) as distinct from the judgment of the House of Lords. I cannot agree in this limitation. I think it is wholly illogical. Here, you have one entire structure, a highway, upon which, taken as a whole, the public can safely pass. For the purpose of repair, the road authority is empowered to temporarily reduce the effective width of that structure, which as a whole was *prima facie* safe for the public traffic. But there is no presumption that *the part* not interfered with is safe for such traffic; and as the law undoubtedly casts some duty on the interfering road authority in reference to the safety of the public, it necessarily must be a duty in reference to a subject-matter which includes the part not interfered with, as it presumably is the only part which is to be used by the public whilst the normal width continues not to be available for them. I am of opinion that if the road authority reduce the width of the road, such act of interference imposes a duty upon it to use due care that the only part of the road which is left available for traffic shall be kept in such a state that it can be safely used by such members of the public as may be travelling on it; and that if, by the act of narrowing the width of the road, there was not sufficient space left to enable the public to use it safely, it was the duty of the road authority either to shut up the road altogether, or in some other way to prevent the public from using it whilst it remained in that unsafe condition.

I hold that the judgment of the House of Lords, in the *Mayor of Shoreditch* v. *Bull* (2), is a distinct authority, which goes the full length of sustaining the liability of the defendants here. That case was to a certain extent complicated by the defendants filling two capacities. They were both the highway and the sewer authority. For the purpose of laying a sewer they dug a trench along a road under their control, and when it was laid, they filled in the trench, and opened the road for traffic. Shortly afterwards, when the plaintiff was driving along it in a cab, the cabdriver found that the part of the road where the trench had been filled in was soft, and consequently crossed to the off-side of the road

(1) 67 J. P. 37. (2) 68 J. P. 415.

K. B. Div. 1912.

RYAN v. TIPPERARY (N. R.) CO. COUNCIL.

Palles, C.B.

to avoid that danger. Having so crossed, he ran into a heap of rubbish which, to the defendants' knowledge, had been deposited by a wrong-doer upon that side of the road, with the result that the cab was overturned, and the plaintiff injured. The jury found that at the time of the accident the part of the road that had been filled in was dangerous for traffic.

The judgment of the Lord Chancellor (Lord Halsbury) is a most interesting one. It is based on one single fact, viz., that there was "enough here to show that the act which was being done was an alteration of the normal condition of the road," and from that he lays down the general proposition that "if there was anything wrong, either in the mode of carrying out the work, or in the period of time which was allowed to elapse between the opening of the road and its becoming firm, or, if in any other way the thing that was being done was negligently done, or if there was evidence for the jury that it was negligently done, within any of the decisions which have been cited to us, it was an act of misfeasance for which the local or road authority under whose authority the thing was done was responsible."

That is, he united together *as one act* the interference with the road and the performance of the duty which arose by reason of that interference. He held that the omission to perform the duty was, in law, to be deemed an act of commission. Why? Because that act of omission had rendered unlawful the act of interference with the road, and rendered it an act of misfeasance. Lord Halsbury then proceeds to state his reasons for identifying each act with the other, and treating the two as one—a task more difficult there than it is here, as there the one body was, as I have already stated, at the same time road authority and sewer authority :—

"I deprecate very much the notion that you can begin an operation which interferes with the ordinary and normal conditions of a road, and that then, by reason of having different duties cast upon you, you can treat that as a separate operation, so that at one point of time you may be responsible in one capacity, or are not responsible in one capacity, and at another point of time you are; and you may hand over the completion of the operation to an authority which is not responsible at all. That would be a sort of metaphysical inquiry into which I am loth to enter. The

person who alone could interfere with the structure of the road as it stood happens to be the person who is also responsible for the continuance of the road in a condition in which it shall not be permitted to be dangerous to the public; and, in this case, I absolutely decline to inquire at what particular point of time the liability as sewer authority ends, and the liability as highway authority is supposed to begin. It is enough for me to say that the person sued was the person who interfered in the first instance with the ordinary structure and normal condition of the road, and that was an act—*not an omission to do an act, but an act*—and until the road was restored in its entirety to its proper and normal condition, so that it could be properly, and without undue risk, traversed by the public at large, it seems to me that it would be idle to say that you could put your finger upon any particular point of time, and say that the liability of the sewer authority began then, and ended then, and then it was handed over to an authority which is not responsible for non-feasance, and if that authority did nothing nobody is responsible at all. That is a process of reasoning to which I, for one, will not assent. The moment the structure of the road is interfered with it comes within the ambit of the operation commenced by the person who is entitled to interfere with the structure of the road; then, until that road is restored into the condition in which it was before that alteration of its structure began, it seems to me the person who interfered with it is responsible for a misfeasance."

In other words, that there was a duty cast upon the road authority to use due care that the portion of the road left open for public traffic should be kept in such a condition that it could be safely traversed by the public; and that the non-performance of that duty amounted to an act of misfeasance, not because that non-performance would, in itself, be an act of misfeasance, but because, being a breach of an obligation to which the act of interference gave birth, that breach should be referred back to, and treated as part of, that act of interference, and the injury caused by that breach of obligation was in law caused by the act of interference.

Upon that view of the law I am of opinion that we are bound to hold that in the present case an obligation was cast on the

K. B. Div. 1912.

RYAN v. TIPPERARY (N. R.) CO. COUNCIL.

Palles, C.B.

defendants to use due care that the portion of the road which they left open for traffic should be in such a condition that it would be safe for the public to travel over it; and there was evidence that it was left unsafe for at least two days, during which the large stone was, to the knowledge of the defendants, allowed to remain upon it unremoved.

The judgment of Lord Macnaghten in the *Shoreditch Case* (1), although extremely short, is important. He puts the matter very tersely; but at the same time by unifying the interference and the breach of duty he comes to the same conclusion as Lord Halsbury—"I think that what was done must be regarded *as one operation*, and by one body. So regarding it, I think there was more than nonfeasance; there was misfeasance."

Lord Lindley says:—"I have no doubt myself, if you look at it broadly, and without those subtle distinctions which have been suggested to us, that this is a case of misfeasance and not of nonfeasance." "It is not as if they left the road alone; they did nothing of the sort. They first began by putting it out of a proper state of repair, and they never put it back into a proper state of repair."

A distinction between that case and the present has been adopted by my brother Kenny, viz., that there the act which caused the cab-driver to cross over to the off-side of the road was the dangerous state of the site of the insufficiently filled-in trench, which, admittedly, was unlawful, whilst, in the present, it was caused by part of the road being repaired, which is said to be lawful.

But, in my opinion, that distinction does not make any difference in the application of the legal principles in question here. Assuming, as *Clements* v. *Tyrone County Council* (2) coerces us to assume, that there was a duty on the defendants to use care that the road should be safe for traffic; further assuming, as was decided in *Shoreditch* v. *Bull* (3), that a breach of that obligation relates back to the original interference with the road, and renders it unlawful; and assuming, thirdly, that which I shall afterwards discuss, that there was evidence

(1) 68 J. P. 415. (2) [1905] 2 I. R. 546. (3) 67 J. P. 37.

of a negligent omission in the present case to remove the stone, the present case and the *Shoreditch Case* (2) are identical. In each, there was an interference with the road, *prima facie* lawful. In each, there was a breach of the duty in the defendants which arose by reason of that interference. In each, the vehicle crossed to a part of the road on which it would not have been but for such breach of duty. In each, the injury in respect of which the action was brought was directly caused by an obstruction put upon the road by a trespasser, but of which the defendants had knowledge. If, in the one case, the existence of the heap of rubbish in the particular spot in which it was, was a thing which imposed liability upon the road authority, so also in the other must the road authority be responsible for the presence of the stone on the road.

I desire to add that, in my opinion, the metaphysical distinction between acts of misfeasance and non-feasance does not arise. The present non-liability of the road authority for non-feasance is based upon the absence of an *actionable* duty to repair. So far as relates to civil responsibility the road authority is safe, so long as it does nothing. But this old rule of law, founded upon no duty lying on an unincorporated "populus" which does nothing (Brookes Abridgment.—Action on the Case, p. 93: *Russell* v. *The Men of Devon* (3)), and upon statutes construed as not imposing upon an incorporated road authority a duty more extensive than that to which when unincorporated it had been subject (*McKinnon* v. *Penson* (4)), has, in my opinion, no application to the duty which arises from the *action* of a body, whether incorporated or not. Whether the due performance by the road authority of their duty of using due care to keep safe for the public use a road which, although its normal structure is interfered with by that authority, is still allowed by them to remain open for such public use, is or is not to be deemed, in strictness, a condition upon the right of the authority to interfere with such structure, it seems to me to be clear that as the performance of that duty must involve *action* by the authority, it may be broken as well by acts of omission as of commission.

(1) 67 J. P. 37. (2) 2 T. R. 667. (3) 8 Exch. 319; 9 Exch. 607.

K. B. Div.
1912.
RYAN
v.
TIPPERARY
(N. R.)
CO. COUNCIL.
Pallas, C.B.

The next question is, Was there evidence here of negligence on the part of the defendants in permitting this stone, of which they were aware, to remain on the road? The width of the road available for traffic was reduced by their action to 7 feet 3 inches; and part of that narrow strip was occupied by a large stone, described by some of the witnesses as the size of a man's head; so that the unobstructed width of the road was reduced to something like 6 feet and a few inches. On the road where this donkey-cart and boy had to pass, a steam-roller was working; and we are at liberty to act upon our own knowledge of the noise made by such engines, and the fear they inspire in animals, including donkeys. The width of the donkey-cart was 4 feet 6 inches, so that a divergence to the extent of about 1 foot, from the mathematical central line of the safe available road, would subject the boy to be thrown under the moving engine. In my opinion, there was ample evidence from which the jury might reasonably draw the conclusion that the result of leaving that stone in the place in which it was, on the side of that road, was dangerous.

I now come to a matter which, I confess, gave me a certain amount of consideration—the question as to contributory negligence. I have no doubt if at a trial in the course of a plaintiff's case, an act is proved which in law amounts *per se* to contributory negligence, as distinguished from being no more than *evidence* of contributory negligence (*Coyle* v. *Great Northern Railway Co.* (1)), it is the duty of the Judge to withdraw the case from the jury, and direct a verdict for the defendant. In reference to this doctrine it was contended here that if the deceased boy, the driver of the donkey-cart, had exercised ordinary care, he would have seen this stone, and could have avoided it; and that his omission to do so was, *in se*, contributory negligence. No doubt he might have seen it, and I cannot say that he did not see it. But we know that when one's attention is drawn to one matter, it may be, and frequently is, diverted from another; and the jury, as reasonable men, may have considered that the chief anxiety on the part of this boy, when driving the

(1) 20 L. R. Ir. 409.

cart, was to get the donkey safely past the place on which the engine was moving, and that to do so was not an easy task to accomplish with an ordinary donkey. Any person who has seen a donkey passing one of those engines while in motion, as was the engine here, must know the antipathy a donkey usually has for such a machine, and that all his efforts are usually directed to keeping as far from it as he can. The jury may reasonably have been of opinion that this boy's attention, in endeavouring to pass between the engine and the grass selvage, was so directed to managing the donkey that the position of the stone escaped his attention. And they may also have thought that, even if he had seen it, he saw it at a time when it was impossible with such control as he had over the donkey to escape the danger. I cannot hold that the jury were not only wrong in the conclusion to which they came, but that that conclusion was one at which reasonable men could not have arrived.

In my opinion, the verdict and the judgment of Dodd, J., ought to be affirmed, and the present motion should be refused with costs.

Solicitor for the plaintiff: *J. O'Brien.*
Solicitor for the defendants: *Arnold Power.*

J. M.

K. B. Div. (*Probate*), 1912.

June 24.

IN THE GOODS OF JAMES M'GUIRK, DECEASED.

Practice—Administration with the will annexed—Lost will—Grant upon motion.

When the assets are small, and all parties interested consent, the Court will grant administration with the will annexed, in respect of a lost will, upon motion.

APPLICATION, by way of motion on notice, for an order that a grant of letters of administration with the contents of the lost will of James M'Guirk, deceased, annexed, as set out in the affidavits upon which such notice of motion was grounded, might be issued to Patrick Leigh.

The application was grounded upon the affidavit of Benjamin Thorp, which was as follows :—

"1. That James M'Guirk, late of Belan, in the county of Kildare, duly executed his last will in February or March, in the year 1889. He died possessed of a small holding, part of the lands of Belan, containing 11A. 14P., or thereabouts, situate in the Baronies of Kilkea and Moone and County of Kildare. [He referred to the fair rent order of the holding.] The said holding was practically the entire assets of the said James M'Guirk, deceased.

"2. The said James M'Guirk, in February or March, in the year 1889, as aforesaid, duly executed his last will by subscribing thereto his name in the presence of Daniel FitzPatrick, of Belan in the county of Kildare, farmer, and William Simpson of Bolton Hill, in the county of Kildare, farmer, the attesting witnesses, both of them being present at the time the said testator executed the said will, and each of them, the said Daniel FitzPatrick and William Simpson, immediately thereafter attesting the said execution in the presence of the testator and each other.

"3. The said testator was at the time of the execution of the said will of sound mind, memory, and understanding, and thoroughly knew and approved of the contents of the said will.

"4. The said will never was revoked, altered, or destroyed by the said testator, nor by any other person in his presence, or by his directions with the intention of revoking the same, and the said will was at the date of the death of said testator a valid and subsisting will.

"5. The circumstances connected with the execution of the said will are as follows—[the affidavit then set forth the circumstances of the execution, the deponent having copied the will from a draft drawn up in accordance with verbal instructions given by the testator, and the will having been then duly executed, and the draft burnt]. About a month or so before James M'Guirk died, he told me he had given the will to Daniel FitzPatrick.

"6. The contents of the said will were in substance, or to the effect, as follows:—

'I James M'Guirk, of Belan, County Kildare, will my holding containing 11 acres and 14 perches, and chattels, to my wife Eliza M'Guirk, for her life, and after her death to her son, Patrick Leigh, now residing in Belan.'

"7. I never saw the original of said will afterwards, but I distinctly remember every particular, and everything contained in the said will, and from my distinct recollection thereof I am able to depose to the contents thereof, as in paragraph 6, hereinbefore mentioned, the said will being entirely in my handwriting, with the exception of the names of the testator and the witnesses thereto.

"8. The said testator died on the 27th June, 1890, without having revoked, altered, or destroyed said will, and it was, as hereinbefore mentioned, a valid and subsisting will at the time of his death. [He referred to the certificate of death.]

"9. The testator left him surviving his widow, the said Eliza M'Guirk, but no issue of his marriage; and save as aforesaid it is believed he left no next-of-kin, certainly none that are known.

"10. [The affidavit then set out the purchase of the farm by the widow, Eliza M'Guirk, under the Irish Land Purchase Acts.]

"11. The said Eliza M'Guirk remained in possession of the said holding during her life, and she died intestate on the

K. B. Div. 1912. *In re* M'Guirk.

23rd December, 1905, and letters of administration of the personal estate and effects of the said Eliza M'Guirk were on the 19th February, 1912, granted forth of the principal registry unto Christopher Kane, of Broomfield, Moone, in the County of Kildare, the attorney of Mary Gorham of Solray, New York, U.S.A., the lawful grandchild and one of the next-of-kin of the said deceased. [He referred to the grant.]

"12. Upon the death of the said Eliza M'Guirk, her son, the said Patrick Leigh, having resided with her for about a year prior to her death, continued in possession of the said lands until the annuity to the Irish Land Commission having fallen into arrears the same were on or about the 11th May, 1910, sold by the Irish Land Commission by public auction for the sum of £1300, and duly conveyed to a purchaser, and after payment of the arrears of the annuity due to the Irish Land Commission, there remains the balance of the said purchase-money, amounting to £87, or thereabouts, now in the hands of the Irish Land Commission, which sum has now been invested in consols.

"13. A short time after said will was made, Daniel FitzPatrick told me he had been given the will by the testator, for safe-keeping, and I believed it was in his possession, until some years ago I heard he had destroyed it. From the date of the death of the said testator, down to the date of the sale of the said holding the said Patrick Leigh states, and I believe him, that no adverse claim has been made by any other person to the said holding, or to the assets of said James M'Guirk, nor since the death of said Eliza M'Guirk has any claim been made by any person claiming through her or her administrator, who I am informed admits the validity of the will of the said testator, and that the said Eliza M'Guirk had no interest in the said holding other than the life estate therein she took under the will of said testator, and the said Patrick Leigh is now entitled to the balance of the money."

An affidavit to the same effect was made by Patrick Leigh, who deposed that he heard the said Daniel FitzPatrick say that he had burned the will, believing it was no longer required, as Patrick Leigh was in possession of the lands of James M'Guirk, deceased. He further deposed that he had made exhaustive

inquiries, and inserted advertisements in the local newspapers, with a view to obtaining information as to the lost will.

The application was further supported by an affidavit of Kate FitzPatrick, which was as follows:—

"1. That my father, Daniel FitzPatrick of Belan, in the county of Kildare, farmer, who died on the 11th May, 1910, had possession of the will of the above-named James M'Guirk, deceased, for a long time. It was kept on a file with other documents, where I saw it from time to time. I did not read it, as I knew its contents from my father, namely, that Eliza M'Guirk was to be owner during her lifetime, and after her death her son, Patrick Leigh, was to be owner of the property.

"2. After the death of the said Eliza M'Guirk, the said Patrick Leigh was in sole possession of the lands; and my father, believing the will was no longer required, destroyed it."

The application was further supported by an affidavit of P. J. Byrne, solicitor, verifying the publication of advertisements offering a reward for the lost will.

D. J. O'Brien, for the applicant:—

As the assets are so small, we are applying for administration with the will annexed on notice of motion. The only other persons interested consent.

T. Bodkin, for the administrator of Eliza M'Guirk, deceased:—

We make no adverse claim, and consent to the application.

MADDEN, J., said that having regard to the smallness of the assets, and to the fact that the will was a simple one, and the sort of will that a countryman would be likely to remember, he would grant the application (1).

Solicitor for the applicant: *P. J. Byrne.*

Solicitor for the administrator of Eliza M'Guirk: *James F. Dowling.*

A. E. C.

(1) See *In the Goods of Callan*, I. R. 9 Eq. 484. [REP.]

Appeal.
1911.

GREENE, Applicant; SHAW, Respondent (1).

Dec. 13, 14.

Workmen's Compensation Act, 1906—*Accident, whether arising "out of" the employment—Herd cycling between two farms on which he was employed —Risk unconnected with employment.*

A herd who was employed to look after the stock on two farms, on one of which he lived, was starting on a bicycle to traverse the distance between them (535 yards) along a public road when a dog, his own property, collided with the bicycle and knocked it down, and the herd thereby sustained injuries from the fall which caused his death.

Held, that the accident did not arise "out of" the employment and that his dependants were not entitled to compensation.

An accident does not arise "out of" the employment unless caused by risk peculiar to that particular employment, and not common, at least in an equal degree, to the general public.

Appeal by the employer from the award, dated 16th October, 1911, of His Honour Judge Brereton Barry, awarding the dependants of the late James Greene, deceased, £150 compensation for his death by accident while in the employment of the appellant.

The facts of the case, which were not in dispute, appeared from the notes of the learned Judge to be in substance as follows:—The deceased was at the time of the accident in the employment of the appellant as herd to look after the stock on two farms, Barberstown and Baybush, near Straffan, County Kildare. In addition to his wages of 10s. a week, he was given a house in Barberstown, with fire and grazing. When going from Barberstown to Baybush, a distance of 535 yards, he rode on a bicycle, sometimes on one borrowed from his employer. His custom on Sundays during the many years (over twenty) that he had been in the appellant's employment was to look after the stock at Barberstown before going to Mass. After Mass he had his dinner, and after that he looked after the Barberstown stock again. After his tea,

(1) Before The Lord Chancellor, and Lords Justices Holmes and Cherry.

about 5.15 p.m. o'clock, he used to go to Baybush to attend to the stock there. On Sunday, 25th June, 1911, while the deceased was on the public road, leaving his residence, and riding a bicycle, a dog, the property of the deceased, rushed out, collided with the bicycle, which was knocked into a ditch on the side of the road, and the deceased man was thrown on his head, and received the injuries from which he died. It was proved in evidence, and so found by the learned Judge, that the deceased intended, after his business at Baybush was over, to proceed to a neighbouring place called Kill, about five miles distant from Baybush, to visit some friends. Mr. Shaw, the employer, said in evidence that he knew the deceased man used a bicycle in connexion with his business of herding, and that it was his duty to visit Baybush some time on the Sunday.

Falconer, K.C., and *J. M. Whitaker*, for the appellant :—

Under the Workmen's Compensation Act, 1906, s. 1 (1), to render the employer liable to pay compensation two separate and distinct conditions must co-exist. The accident must arise "out of ' the employment and "in the course of" it. Both those are equally essential to impose the liability which is purely of statutable creation. We submit that neither condition was fulfilled in the present case. Greene's employment was that of a herd. When he was mounting his bicycle, he was certainly not discharging a herd's duty at Barberstown. He was at a distance from Baybush, nor was the sole purpose of his journey to Baybush to look after the stock there, for it was equally his object to visit his friends at Kill. This distinguishes the case from *Moore* v. *Manchester Liners* (1), for there the sailor was returning to duty. The net point decided in that case was, as stated by Farwell, L.J., in *Kitchenham* v. *Owners of S.S. Johannesburg* (2), that "the man had got back to the sphere of his employment." But, even supposing the Court should hold that the County Court Judge was right in deciding that the accident arose in the course of the herd's employment, it certainly did not arise "out of" it. On that point

(1) [1909] 1 K. B. 417; [1910] A. C. 498.

(2) [1911] 1 K. B. 523, at p. 530.

Appeal. 1911. GREENE v. SHAW.

Kitchenham's Case, which was affirmed by the House of Lords (1), is an express authority. In dealing with this question, Fletcher-Moulton, L.J., whose judgment was concurred in by the Master of the Rolls, Sir H. Cozens-Hardy, and was adopted by the House of Lords, says:—"If the accident is shown to arise from something not specifically connected with the ship, it cannot be said to arise out of his employment," and he contrasts the case with one in which a similar accident might occur through a dense fog. There are here three cardinal points. First, the accident took place on the public road. [HOLMES, L.J., referred to *Nelson* v. *Corporation of Belfast* (2).] Secondly, the accident did not arise from a risk peculiar to the employment. The terminus at which the employment begins is not the public road leading to the place where the workman was employed. The question is, was he doing his employer's work at the time? Thirdly, the proximate cause of the accident was the man's own dog. In *Wilson* v. *Laing* (3), where a domestic servant, employed in a family where there were children, was struck in the eye by a ball, playfully thrown at her by a fellow-servant, and severely injured, it was apparently argued that the risk was incidental to employment amongst children and their toys, but this argument did not prevail with the Scotch Judges, who decided the case against the applicant. So in *Fitzgerald* v. *Clarke & Son* (4), where a workman was injured by a practical joke practised on him by two of his fellow-workmen during his actual employment, it was held that the injury did not arise "out of" his employment. An illustration of the same principle, and of its application under peculiar circumstances, will be found in *Craske* v. *Wigan* (5), decided by the same Judges, Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ. These decisions necessarily followed from the previous decision of the Court of Appeal in *Armitage* v. *Lancashire and Yorkshire Railway Co.* (6), which was the earliest case in England on the immunity of an employer where the injury was caused by the purely tortious act of a fellow-servant. As to an accident occurring on the way to the

(1) [1911] A. C. 417.
(2) 42 Ir. L. T. Misc. 223.
(3) 2 Butterworth, 118.
(4) [1908] 2 K. B. 796.
(5) [1909] 2 K. B. 635.
(6) [1902] 2 K. B. 178.

workman's place of employment or on his return, see *Walters* v. *Stavely Coal and Iron Company* (1); *Davies* v. *Rhymney Iron Co.* (2); *Kelly* v. *Owners of the Foam Queen* (3). In the last case a ship's fireman, on descending steps from the quay to join his ship, slipped and was injured; and he was held not entitled to compensation. Cozens-Hardy, M.R., in giving judgment, said—"The case would be exactly the same if he had slipped on the pavement in the street before he came to the steps," and adds—"We have pointed out, not once or twice, but often, that, save in certain exceptional cases, the Act does not extend to and protect the workman when on his way from his house to his employment." These exceptional cases, it will be found, are those where the employer provides the means of access. The rule was extended in the Scotch case of *Anderson* v. *Fife Coal Co.* (4) to a case where the workman, a miner, was on his employer's land when the accident occurred, though he had not reached the point where his actual duties commenced. The result of the authorities on this point is clearly stated in *Walters* v. *Stavely Coal and Iron Co.* (1). That was a very strong case. A miner was proceeding to his work along a path in the nature of a short cut, which had been prepared by the employers for the miners' accommodation (but the use of which was not compulsory), and he slipped on some steps about a mile away from his employment. His claim was disallowed by the House of Lords. Their Lordships held that the accident arose neither "out of" nor "in the course of" his employment.

To the same effect is *Gilmour* v. *Dorman, Long, & Co.* (5), a case decided by the Court of Appeal, a couple of days after the House of Lords' judgment in *Walters' Case* (1). These authorities must be treated as over-ruling the decision of this Court in *M'Kee* v. *Great Northern Railway Co.* (6), so far as it is inconsistent with them, but the circumstances of *M'Kee's Case* (6) were very special. It may perhaps be accounted for on the hypothesis that the Court thought there was some evidence

(1) 4 Butterworth, 89, 303.
(2) 16 T. L. R. 329.
(3) 3 Butterworth, 113.
(4) *Ibid.*, 539.
(5) 4 Butterworth, 279.
(6) 42 I. L. T. R. 132.

Appeal. 1911.

GREENE v. SHAW.

to support the finding of the Recorder of Dublin, in favour of the claimant. To arise "out of" the employment, the accident must be due to some unusual risk connected therewith: *Andrew* v. *Failsworth Industrial Society* (1); *Kelly* v. *Kerry County Council* (2) (the lightning cases), the contrast of which show the distinction very clearly. The proposition for which we contend is absolutely laid down in *Pierce* v. *Provident Clothing Co.* (3). As to attacks by animals, *Rowland* v. *Wright* (4), was a case of injury to a workman from the bite of a stable cat, kept there with the knowledge of the master. But the Master of the Rolls carefully guarded his judgment from being distorted into an authority that the employer would be liable for injuries caused by an animal which was a stranger to his premises.

Cecil Fforde, for the applicant (Mrs. Jane Greene, widow of the deceased herd):—

There can be no doubt whatever that the accident occurred "in the course of the employment." The deceased man was employed at two farms, both of which were the property of his employer, situated at a very short distance from one another, traversed by him habitually, to his master's knowledge and with his master's sanction, on a bicycle. His duties took him to both, and from one to the other. He had no other employment. His whole time, except a few hours of leisure, was devoted to his work. His employment was continuous and unbroken. Can it be said that he was not in his master's employment when he was cycling from one farm, at which his duties for the day were over, to the other, where similar duties awaited him? Suppose the farms were separated merely by a laneway, and the accident happened while he was crossing it, could it be reasonably contended that it did not arise in the course of the employment? Take the cases of which there are examples in Dublin, of a large trading company having shops or warehouses on both sides of a street: if an employee while crossing the street for the purposes of his employment is injured, could it be said

(1) [1904] 2 K. B. 32.
(2) 42 Ir. L. T. R. 23.
(3) [1911] 1 K. B. 997.
(4) 1 Butterworth, 192.

that the accident was excluded from the Act? The case is in this respect unique. It is not, as in most of those cited for the appellant, an accident occurring on the workman's way from his home to his work, or on his return home. Here the accident happened while the deceased was passing from one section of his employment to another. It is immaterial that it occurred on a public road, not on ground belonging to the employer. Nor is it material that the accident was brought about by a dog which belonged to the workman. The dog was naturally required for the purposes of herding.

Then did the accident arise "out of" the employment? If the point were not closed by judicial authority, perhaps much might be said in favour of contending that "out of" and "in the course of" the employment meant the same thing, viz., "while engaged in the employment"—and that any redundancy in the language, a not unusual feature in modern statutes, was due to a desire on the part of the Legislature to enlarge and not to contract the scope of the relief intended to be given by this code. It must, however, be conceded that the trend of recent judicial utterances, in order to give effect to the word "and," has been to hold that "out of" must mean something different from "in the course of"; and, to accomplish this, artificial and even fantastic meanings have been given to the words "out of." No Judge or Law Lord has attempted a definition of these two simple words, and few have endeavoured to reconcile the decisions on this often recurrent point, ending in a disinclination to listen to previously decided cases, on the plea that each case must be decided on its particular facts. But upon a recent review of the previous decisions, in giving judgment in *Hewitt* v. *Owners of S.S. Duchess* (1), Fletcher-Moulton, L.J., expressed the opinion that the result of them was, that, in the case of a seaman leaving his ship to go ashore by permission for his own pleasure or business, if an accident should befall him during his absence from the ship, that would not arise "out of the employment," though it admittedly would be "in the course of" it, and the learned Judge points out to what

(1) [1910] 1 K. B. 772, at p. 776.

Appeal. 1911. GREENE v. SHAW.

absurdities the application of this rule, established and binding on him, as he thought, contrary to his own personal views as expressed in *Moore* v. *Manchester Liners* (1), must lead. Farwell, L.J., admits that an accident "arising out of" an employment must arise "in the course of" it (2). Certainly it is difficult for the non-judicial mind to see why the converse should not be equally true.

This case is really ruled by *Pierce* v. *Provident Clothing and Supply Co.* (3). There a collector and canvasser for the defendant company, who used a bicycle with the knowledge and consent of his employers, while transacting their business in going from house to house, was knocked down and killed by a tramcar in a street in Birkenhead, while riding a bicycle on his rounds. It was held in the Court of Appeal, by Cozens-Hardy, M.R., and Fletcher-Moulton, L.J., that the accident arose both "in the course of" and "out of" his employment. The decision in *Kitchenham's Case* (4) proceeded entirely on the ground that there was a suspension of the employment, and that it was not shown by the applicant, on whom the burden of proof rested, that the accident did not occur on the quay, before the deceased man set foot on the gangway provided for access to his ship. But here the employment was continuous—there was no suspension of it, at the time when the accident was conclusively proved to have happened. The opinion of the majority of the House of Lords in *Moore* v. *Manchester Liners* (5) is in favour of sustaining the award of the County Court Judge here; so also is *Nelson* v. *Corporation of Belfast* (6). *Pierce's Case* (3) was anticipated by the Court of Session, in *M'Neice* v. *Singer Sewing Machine Co.* (7), also the case of a salesman and collector, injured in the street, while cycling in the course of his employment.

(1) [1909] 1 K. B. 417.
(2) *Kitchenham's Case* [1911] 1 K. B., at p. 530.
(3) [1911] 1 K. B. 997.
(4) [1911] 1 K. B. 523; [1911] A. C. 417.
(5) [1910] A. C. 498.
(6) 42 Ir. L. T. Misc. 223.
(7) 4 Butterworth, 351; 48 Sc. L. R. 15.

Falconer, K.C., in reply :—

In both *M'Neice's Case* (1) and *Pierce's Case* (2), the decisions went expressly on the ground that a peculiar liability to street accidents attached to the employment of a canvasser or collector who had to be continually cycling through public streets in the transaction of his business. [Counsel also cited *Gilbert* v. *Owners of S.S. Nizam* (3).]

THE LORD CHANCELLOR :—

This is a very sad case. During Mr. Falconer's argument it seemed to me that the law was absolutely settled in his favour. I have, however, been much influenced by *Pierce's Case* (2), cited by Mr. Fforde in his very able argument, because I would myself be prepared to come to the conclusion that the deceased man was acting in the course of his employment when the accident happened. He was going from a house on one of his employer's farms where he lived to another farm, also the property of his employer, to attend to cattle there; and upon that branch of the case *Pierce's Case* (2) seemed to carry Mr. Fforde's contention the whole way. But on reflection there appears to me to be a clear distinction. In that case the Court based its judgment on the fact that as the applicant's duty brought him constantly on the streets in the course of his employment, he was more exposed than were other people to street perils. The Master of the Rolls said, "I think the man was more exposed than other people. His employment exposed him to the risk of the streets practically all day long."

The *Kitchenham Case* (4) was a case of continuous employment. The House of Lords held that the man was injured in the course of his employment; but as to the question whether the injury arose out of his employment the Lord Chancellor (Earl of Loreburn), with whose opinion the other Lords present concurred, said, "Upon the findings of fact which the County Court Judge

(1) 4 Butterworth 351; 48 Sc. L. R. 15.
(2) [1911] 1 K. B. 997.
(3) 3 Butterworth, 455.
(4) [1911] A. C. 417.

Appeal. 1911.

GREENE v. SHAW.

The Lord Chancellor.

states, while at the same time giving his view of the law, I think the accident arose from a risk common to everyone, namely, that of falling from the quay into the water, and was not specially connected with his work and employment."

There was no special danger to this unfortunate man connected with his occupation. I have no doubt that he passed over this road twice a day, and he was not exposed to nearly so much danger as the canvasser Pierce.

I agree with Lord Justice Holmes that in deciding these cases under the Workmen's Compensation Acts our only safety is to follow a decision of the House of Lords in one of the latest cases dealing with this subject, where the situation was very similar to that existing in the present case. We therefore think that the award of the County Court Judge cannot be sustained.

HOLMES, L.J. :—

It is a very satisfactory thing in a case under the Workmen's Compensation Acts to have a decision of the House of Lords as a guide; and it is still more satisfactory when we find that it cannot be distinguished from the case which this Court has to decide.

I was of opinion there was some evidence before the County Court Judge that the deceased, James Greene, was, at the time of the accident, acting in the course of his employment; but I failed to see how it arose out of the employment. In the *Kitchenham Case* (1) the House of Lords, in circumstances that I cannot distinguish, came to the same conclusion. It was not part of the duty of the herd to ride on a bicycle. He was riding on it for his own convenience when the accident unconnected with his employment occurred.

CHERRY, L.J. :—

I concur with what the Lord Chancellor has said about Mr. Fforde's able argument. He put his case very clearly and effectively. I think that there was some confusion throughout

(1) [1911] A. C. 417.

the case in not distinguishing between the two questions, whether an accident arises "out of" and whether it arises "in the course of" the employment. While it may reasonably be argued that the accident, in this case, arose in the course of the deceased man's employment, on the other question as to whether it arose out of it I am quite unable to distinguish the case from *Kitchenham* v. *Owners of s.s. Johannesburg* (1). For an accident to arise "out of" a man's employment it must be shown to have been the result of a risk in some way specially connected with the business in which he was engaged, though it need not be peculiar to that business alone. It is this which distinguishes *Pierce* v. *Provident Supply Co.* (2) and *M'Neice* v. *Singer's Sewing Machine Co.* (3). In *Pierce's Case* (2) the man who was killed was a collector and canvasser, whose employment involved his continually passing through crowded streets on a bicycle, and it was held that he was thus peculiarly in danger of being run over, and therefore that his being knocked down by a tramcar while in the course of his rounds was an accident arising "out of" his employment. There, though the risk was not confined to persons engaged in that kind of employment, it was greater in their cases than in that of other cyclists or foot-passengers. Here we have the case of a man who once or twice a day passed over a quiet country road. If he used a bicycle, he incurred no greater risk than any other cyclist, and his risk was in no way specially connected with his employment as a herd. I cannot, therefore, see how it arose "out of" his employment. Under these circumstances I am obliged (and I may say with regret) to concur in the decision reversing the award of the County Court Judge.

Solicitors for the applicant: *Brown & M'Cann.*
Solicitor for the respondent (appellant): *W. A. Lanphier.*

W. G.

(1) [1911] 1 K. B. 523; [1911] A. C. 417.
(2) [1911] 1 K. B. 997.
(3) 1911 S. C. 12.

Appeal.
1912.
May 16.

THE KING (PATRICK JOSEPH BURKE) *v.* DANIEL McCARTHY (1).

Urban District Council—Chairman—Election of, at annual meeting—Equality of votes—Selection by lot—10 *Vict. c.* 16 (*Commissioners Clauses Act*, 1847), *ss.* 37, 38.

If, at an annual election of Chairman of an Urban District Council for the ensuing year, an equal number of votes be given for two candidates, the choice of one of them as such chairman is to be decided by lot. The outgoing chairman, though presiding, has not a casting vote.

APPEAL by the defendant from an order of the King's Bench Division (Palles, C.B., and Kenny and Wright, JJ.), that an information in the nature of a writ of *Quo warranto* at the relation Patrick Joseph Burke, be exhibited against the defendant to show by what authority he claimed to be, and to act as, Chairman of the Skibbereen Urban District Council.

The facts were not in dispute, and appeared, from the affidavit of the relator, who was a member of the Skibbereen Urban District Council, to be as follows:—

The annual election of Chairman of the Council was held on the 23rd day of January, 1912. There were present eight members of the Council, the outgoing chairman, Mr. Charles McCarthy being in the chair. The defendant and the relator were respectively proposed and seconded for the position of chairman for the ensuing twelve months. Four members voted for the defendant, and four for the relator. Mr. Charles McCarthy then claimed to be entitled to a casting vote; and, after some discussion as to whether he was so entitled, or the chairman be selected from the two candidates by lot, gave a casting vote for the defendant, and declared him duly elected. At the ordinary meeting of the 5th February, 1912, the defendant presided as chairman without any further resolution.

(1) Before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

A. M. Sullivan, K.C., and *Swayne*, for the appellant:—

Admittedly the question for decision turns upon the construction of two sections, 37 and 38, of the Commissioners Clauses Act 1847 (1), and it is one of first impression, as there does not appear to have been any decision upon it. At the annual meeting for the election of chairman in case of a tie, is the new chairman to be selected by lot, or has the outgoing chairman a casting vote? The two sections have separate and distinct objects. Section 37 provides for the election of chairman (*a*) at the first and subsequent annual meetings, (*b*) in cases of casual vacancy, (*c*) of any meeting in the absence of the chairman in office. Section 38 is conversant with the business of the Board, which is to be strictly conducted by majority rule, except in one case where such rule could not be applied, namely, where there is a tie at the election of a chairman of a meeting in the absence of the official chairman. In that case the proviso in section 38 applies, and the election is by lot. In such case there

(1) 10 Vict. c. 16, s. 37: "At the first meeting of the Commissioners they shall, by a majority of the votes of the Commissioners present, elect one of their body to be their chairman until the next annual meeting of the Commissioners, when, and at every subsequent annual meeting, the Commissioners shall in like manner elect a chairman for the ensuing year; and in case the chairman die, or resign, or cease to be a Commissioner, or otherwise become disqualified to act as such, the Commissioners present at the meeting next after the occurrence of such vacancy shall choose some other of their body to fill such vacancy, and the chairman so elected shall continue in office so long only as the person in whose place he was elected would have been entitled to continue chairman; and if at any meeting of the Commissioners the chairman be not present, one of the Commissioners present shall be elected chairman of such meeting by the majority of the votes of the Commissioners present at such meeting."

Section 38: "At all meetings of the Commissioners the questions there considered shall be decided by the votes of the majority present, and if there be an equal division of votes upon any question, the chairman or Commissioner acting as chairman at such meeting shall, in addition to his own vote as a Commissioner, have a second or casting vote; provided always that if at any such meeting there be an equality of votes in the election of the chairman, it shall be decided by lot which of the Commissioners having an equal number of votes shall be the chairman. Provided also, that at every annual meeting the chairman going out of office at that meeting shall, if present and willing to act, be the chairman of such meeting."

Appeal. 1912.

THE KING (BURKE) v. MCCARTHY.

would be no other way out of the difficulty, because *ex hypothesi* there is no chairman to give a casting vote. But this does not arise where the outgoing chairman is, under the express authority of section 38, presiding over the meeting for the election of his successor.

George M'Sweeney, K.C., and *J. M. Fitzgerald*, for the relator :—

What is the meaning of "chairman" in section 38, having regard to section 37? Equality of votes is unprovided for by section 37, and the only provision made for such a contingency is that in the proviso under consideration. If limited as the appellant's counsel contend it should be, what would occur in case of a tie at the election of the original chairman, or in the case of a death vacancy? The proviso must extend to all the cases mentioned in section 37.

THE LORD CHANCELLOR :—

I must confess that when the case was first opened I was inclined to adopt the view presented by Mr. Sullivan. But, on further consideration, I can entertain no doubt as to the meaning of sections 37 and 38 (1) taken together, the first dealing with an occasion on which the body is taking steps to elect a chairman for the ensuing year. The contingency of there being an equality of votes at such election, left unprovided for in section 37, is regulated by the provisos at the end of section 38. The outgoing chairman may preside at the annual meeting; but what authority has he to give a casting vote? Section 37 does not at all touch the question which has here arisen. That section provides for the election of a chairman at the first meeting of the Commissioners, for election in case of a casual vacancy during the year, for the election of the chairman of a meeting where the Chairman of the Commissioners is absent; and in all these cases the chairman is elected "by the majority of the votes of the Commissioners present." That section does not provide for the case of an equality of votes.

(1) 10 Vict. c. 16 (Commissioners Clauses Act, 1847).

Section 38 provides that "at all meetings of the Commissioners the questions there considered shall be decided by the votes of the majority present; and if there be an equal division of votes upon any question, the Chairman, or Commissioner acting as Chairman at such meeting, shall, in addition to his own vote as a Commissioner, have a second or casting vote." But then comes the proviso that "if at any such meeting there shall be an equality of votes in the election of the Chairman, it shall be decided by lot which of the Commissioners, having an equal number of votes, shall be the Chairman." I think that plainly conveys that at the election of Chairman, if there be an equality of votes, the matter must be decided by lot; and I, therefore, think that the judgment of the King's Bench Division was right and should be affirmed.

HOLMES, L.J.;—

If I were called on to construe the two sections (1) together without assistance, I should probably hold that as there was a legally appointed chairman at the annual meeting, he was entitled to have a casting vote for the election of his successor. The sections, however, seem to be inconsistent; and, although my mind is in some doubt, I do not dissent from the opinion expressed by five Judges.

CHERRY, L.J.:—

I concur with the Lord Chancellor. I think the construction of the section (2) is perfectly plain. The words "such meeting" must be read as applying to all meetings of the body: the word "chairman" must include (*a*) the chairman at the first meeting of the body; (*b*) the chairman for the broken period in case of a casual vacancy, and (*c*) the chairman for the time being in the temporary absence of the actual holder of the office. In these three cases, should there be an equality of votes, there would be

(1) 10 Vict. c. 16 (Commissioners Clauses Act, 1847), ss. 37, 38. (2) s. 38.

Appeal. 1912.

THE KING (BURKE) *v.* MCCARTHY.

Cherry, L.J.

no outgoing chairman to give a casting vote; and, *ex concessis*, the only way of electing a chairman would be by lot. In each of these cases section 38 must apply. Why should it not equally apply to the annual election, where there is nothing in the words of the section itself to restrict its application?

Solicitor for the relator: *P. J. Collins.*

Solicitor for the defendant: *William J. Kingston.*

W. G.

WILLIAM ARLAND USSHER, PETITIONER; MARY USSHER, otherwise CAULFIELD, RESPONDENT (1).

K. B. Div. 1912.

Feb. 20, 21, 22, 23, 24. April 20.

*Marriage law—Marriage of Roman Catholics by Roman Catholic priest—Two witnesses, as required by decree of Council of Trent and decree "Ne Temere," not present—One of the parties a Protestant within previous twelve months—Conditional marriage—*19 *Geo.* 3, *c.* 13 (*Ir.*)—7 *&* 8 *Vict. c.* 81, *s.* 3—26 *&* 27 *Vict. c.* 90, *s.* 11, *sch.*—33 *&* 34 *Vict. c.* 110, *s.* 39.

A marriage solemnized in Ireland by a Roman Catholic priest, between two Roman Catholics, according to the ritual of the Roman Catholic Church in use in Ireland, but in the presence of only one witness, is by the law of the land valid, although it may not be valid by the law of the Roman Catholic Church, by reason of there not having been present two witnesses in addition to the priest, as required by the decree of the Council of Trent, "*De Reformatione Matrimonii*," and the decree "*Ne Temere*."

Such marriage is valid, notwithstanding that one of the parties had been a Protestant within the preceding twelve months.

The words in the Irish ritual, "If Holy Church will it permit," do not make the marriage contract conditional upon the marriage being in accordance with the law of the Roman Catholic Church.

A marriage effected in accordance with the law of the land, and followed by cohabitation, is not invalidated by the fact that such marriage is void by the law of the Roman Catholic Church, and that the parties, had they known this, would not have entered into the marriage contract.

MOTION to set aside judgment. The action was brought for the purpose of obtaining a declaration that what purported to be a marriage celebrated between the petitioner and the respondent on the 24th April, 1910, did not constitute a lawful or valid marriage, and that the same was null and void.

The petition set out as follows:—

"1. That your petitioner on the night of the 24th day of April, 1910, at the hour of 10 p.m., or thereabouts, in a bedroom in your Petitioner's house at Eastwell, aforesaid, he being then a

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and GIBSON, J.

K. B. Div. 1912.

USSHER *v.* USSHER.

member of the Roman Catholic Church, went through a ceremony of marriage with one Mary Caulfield, now falsely called Mary Ussher, then resident at Eastwell, aforesaid, and also a member of the Roman Catholic Church.

"2. The said ceremony was performed by the Rev. Joseph Fahy, Parish Priest of Killalaghtan and Kilrickill, and purported to be performed in accordance with the rites and ceremonies of the Roman Catholic Church, in the presence of one Agnes Kavanagh, no other person being present or witnessing the said ceremony.

"3. Your petitioner says that the said marriage was null and void by reason of the fact that only one witness to the same was present, and that the said ceremony was not carried out or solemnized in accordance with the rites, regulations, and ceremonies of the Roman Catholic Church, or according to the law.

"4. That at the time of the said ceremony hereinbefore mentioned, and at the present time, your petitioner and the said Mary Caulfield had and have their domicile in Ireland.

"Your petitioner therefore prays that this honourable Court will be pleased to decree:—That the said ceremony of the 24th day of April, 1910, did not constitute a lawful or valid marriage between your petitioner and the said Mary Caulfield, and that the same is null and void."

The answer of the respondent set out:—

"1. That the respondent admits the facts and matters set out in paragraphs 1 and 2 of the petition, save that she denies that she is now falsely called Mary Ussher, and asserts that she is now legally and properly called Mary Ussher, being the lawful wife of the petitioner.

"2. That the respondent denies that the said marriage was null or void by reason of the fact that only one witness to the same was present, or for any other reason whatever, and the respondent also denies that the said ceremony was not carried out and solemnized in accordance with the rites, regulations, and ceremonies of the Roman Catholic Church, and the respondent further denies that the said ceremony was not carried out or solemnized according to law.

"3. That the respondent says that the said ceremony which was solemnized on the 24th April, 1910, as mentioned in the petition, constituted a valid marriage, and that the respondent is by virtue thereof the lawful wife of the petitioner.

"4. That from the date of the said marriage the petitioner has cohabited with the respondent, and there has been issue born of the said marriage one child, Kathleen Mary Ussher, born the 15th day of January, 1911.

"The respondent prays:—(1) That this honourable Court may be pleased to declare that the said ceremony of the 24th April, 1910, constituted a lawful and valid marriage between the petitioner and the respondent; (2) That the petition may be dismissed."

The reply of the petitioner was as follows:—

"1. Save as admitted in the answer of the respondent he joins issue.

"2. The alleged contract of marriage was not accompanied by a valid religious ceremony as required by law.

"3. The alleged contract of marriage was subject to and upon the express condition that the same should be according to the rite of the Roman Catholic Church.

"4. The alleged contract of marriage was subject to and upon the express condition that the Roman Catholic Church should permit of the same being effectual as a valid marriage.

"5. The alleged contract of marriage was made upon the faith and belief that the same was one which would be valid as a Roman Catholic Sacrament of marriage and binding according to the law of the Roman Catholic Church, and was never intended to have any other legal operation or effect.

"Wherefore the petitioner prays as before."

The action was tried before Kenny, J., with a special jury of the county of the City of Dublin on the 18th and 19th December, 1911. There were only two witnesses examined, both on behalf of the petitioner. At the conclusion of the petitioner's case the jury, with the consent of both sides, found a verdict as follows:—"That on the 24th day of April, 1910, a religious ceremony

K. B. Div. 1912. USSHER v. USSHER.

purporting to be a marriage according to the form and rites of the Roman Catholic Church between petitioner and respondent, they both being Roman Catholics, was celebrated by the parish priest of the parish where both parties resided, at the petitioner's house, but in the presence of only one witness, and that the parties afterwards cohabited." The jury were discharged after having found this verdict, and the legal arguments proceeded before Kenny, J. He reserved judgment, and delivered it on the 17th January, 1912, holding the alleged marriage to be a valid one. The facts of the case are fully set out in the judgment.

KENNY, J. :—

The object of the petition in this suit is to obtain a declaration from the Court that a ceremony purporting to be one of marriage, which was performed on the 24th April, 1910, did not constitute a lawful or valid marriage between the petitioner and the respondent and that the same is null and void. The grounds stated in the petition for impeaching the alleged marriage are, that only one witness to the ceremony was present, and that the latter was not carried out or solemnized in accordance with the rites, regulations, and ceremonies of the Roman Catholic Church or according to law. The answer of the respondent asserted that the said ceremony constituted a valid marriage and that the respondent by virtue of it was the lawful wife of the petitioner. It stated that from the date of the alleged marriage the petitioner had co-habited with the respondent and that there had been issue one child, born on the 15th January, 1911—and it denied that the ceremony was not carried out and solemnized in accordance with the rites, regulations, and ceremonies of the Roman Catholic Church—or that it was not carried out or solemnized according to law.

In reply to the respondent's answer, the petitioner made the case that the alleged contract of marriage was a conditional one; that it "was subject to and upon the express condition that same should be according to the rite of the Roman Catholic Church"; and that "the Roman Catholic Church should permit of the same being effectual as a valid marriage";

and that the said contract "was made upon the faith and belief that the same was one which would be valid as a Roman Catholic sacrament of marriage and binding according to the law of the Roman Catholic Church, and was never intended to have any other legal operation or effect."

The practical legal results of granting the prayer of the petition are obvious. The petitioner's child will be bastardized, and her mother degraded. In the eyes, however, of the Roman Catholic Church the child and mother do not now occupy, and have not since the date of the said ceremony occupied, any position different from this. The law of the Church is not in controversy. It is regulated by one of the decrees of the Council of Trent, —adopted in the sixteenth century and promulgated in this country in the year 1830—and by the recent decree known as the decree Ne Temere, issued in August, 1907, by the Sacred Congregation of the Council with the authority of the present Pope. To the latter decree I need not more particularly refer, inasmuch as the provisions of that of the Council of Trent are those that are relevant to the question I have to consider. Both decrees purport to have been directed against what the Church styled "the rash celebration of clandestine marriages," and very clear and distinct language is used for the purpose of indicating the safeguards for publicity and proof of marriage which the Church regarded as essential, and the penalties that would be incurred by a disregard of those safeguards. The decree of the Council of Trent embodying those provisions runs as follows in the translation:—"Those who, otherwise than in the presence of the parish priest himself or of another priest acting with the licence of the parish priest or of the ordinary and in the presence of two or three witnesses, shall attend to contract matrimony, the Holy Synod renders them altogether incapable of contracting marriage thus, and decrees that contracts of this kind are null and void," from which it is manifest that no marriage can be regarded by the Catholic Church as valid unless the matrimonial contract be entered into in the presence of a priest and at least two witnesses. This exposition of the decree was confirmed by the very clear evidence of Dr. Gilmartin, the Roman Catholic Bishop of Clonfert, who stated that not only was a religious ceremony of marriage

Kenny, J. 1912.

USSHER v. USSHER.

with only a single witness absolutely invalid in the eye of the Church unless by dispensation from Rome, but that he himself, as Bishop, had no power to dispense with two witnesses. This latter statement becomes of some importance in dealing with portion of the evidence given by the clergyman who in this case is alleged to have celebrated a marriage between the parties, although it has no weight and is not a factor in determining the validity of such marriage in accordance with the law of the land.

The circumstances attending the celebration of the alleged marriage between the petitioner and the respondent are most exceptional, and the action and evidence of the clergyman—the Reverend Joseph Fahy—particularly unsatisfactory. The reverend gentleman might have been subjected at the hands of counsel to a rigorous cross-examination and to severe animadversion, but he has escaped both, because, I would conclude, there was no necessity to supply additional elements for the findings of fact, and his years and position induced an attitude of leniency. For these findings we have to depend almost altogether on Father Fahy's evidence, he and Dr. Gilmartin being the only witnesses examined in the case. The petitioner did not present himself for examination, although his evidence would have been important on the question—no doubt immaterial in the result—whether Father Fahy had received marriage faculties from his bishop, and I think he might have added considerably to our stock of knowledge of his intentions and state of mind in connexion with the argument of "conditional contract." He was a gentleman living at a place called Eastwell, near Loughrea, in the county of Galway. The respondent was his housemaid. He was aged about thirty—she about twenty. He was a Protestant, she a Roman Catholic. What their relations to one another were before the 24th April, 1910, we do not know, save that he told Father Fahy he "cared for her and had a great regard for her"; that she was a worthy person; that he had promised to marry her, and had made up his mind to do so. Early in April, 1910, he called on Father Fahy, who was the parish priest of the parish in which Eastwell is situated, and made this statement to him, and informed him that he wished to become a Catholic, that he had thought over it for a long time; and that he had been in the militia in Scotland, and had often gone to the

Roman Catholic Church there. Father Fahy told him he (Father Fahy) should get "faculties." After this interview the petitioner became urgent and called twice on Father Fahy to ascertain if he had obtained the "faculties." Eventually, according to the evidence of the reverend gentleman, he obtained them from his bishop; and he declares that they dealt not only with the reception of the petitioner into the Church but with his intended marriage. The document embodying those faculties has not been produced. Father Fahy says he has searched for it and cannot find it. The bishop remembers that Father Fahy applied to him for faculties to receive an unknown person into the Church, but while he has no recollection of being asked for faculties with reference to marriage, he says he will not contradict Father Fahy's statement that he gave them. But it is manifest that the bishop, if he did give marriage faculties, could not, as he says, have given authority to dispense with two witnesses, and the probability in such a case is, that the authority had reference to a marriage in a private house in respect of which it was within the bishop's power to confer a faculty. Whatever form the document assumed, it was shown to the petitioner by Father Fahy about the 18th April, 1910, in the course of a further interview which took place in a lane in the vicinity of Eastwell. On that occasion arrangements were made for what was practically a secret marriage. Father Fahy told the petitioner that two witnesses would be necessary and made it clear to him that it would be no marriage unless the priest and two witnesses were present. Names of possible witnesses were discussed, but such as were suggested to the petitioner were rejected by him, as he stated that he feared publicity and desired to keep the ceremony secret. He then, in a very deliberate fashion, arranged with Father Fahy for two secret ceremonials; one, of reception into the Church, and the other, of marriage with the respondent. They were both to be performed at night—not in any place of worship but in the private residence of the petitioner at Eastwell;—the priest was to come, unaccompanied, to the house by a certain way agreed on between him and the petitioner—and the latter was to meet him outside and admit him. In accordance with this arrangement, Father Fahy, on Sunday night the 24th April, 1910, about the hour

Kenny, J.
1912.
USSHER
v.
USSHER.

of 10.30 o'clock and in very wet weather, secretly arrived at the petitioner's residence; met the petitioner outside, and was brought by him into the house and into an unused bedroom upstairs, where the priest performed the ceremony of receiving the petitioner into the Catholic Church. At its conclusion the petitioner brought into the room the respondent and one Agnes Kavanagh, his cook, and there and then Father Fahy proceeded to perform the religious ceremony of marriage between the petitioner and the respondent in assumed accordance with the ritual of the Roman Catholic Church, but in the presence of only one witness, namely, the said Agnes Kavanagh. He asked each of them, the petitioner and respondent, if he and she would take the other as wife and husband respectively "according to the rite of our Holy Mother the Church," whereupon, the replies being in the affirmative, each of them repeated after the priest the solemn language of the ritual, concluding with the words "till death doth us part, if Holy Church will it permit, and thereto I plight thee my troth." The priest then went through the remainder of the ceremony as the same appeared in the prayer-book which he used, and which he produced before me. He gives a graphic description of portion of it. He says "he" (the petitioner) "put a ring on her finger in the usual way. I blessed the ring first. He gave her gold and silver in the usual way, and I blessed them as man and wife, they kneeling down before me. He then kissed her." The religious ceremony having been concluded, the priest, who had brought with him a form of certificate in pursuance of the Marriage Registration Act, 1863, proceeded to fill it up and had it signed by the parties and by Agnes Kavanagh. He himself also signed it as the officiating clergyman, testifying that it was the certificate of a "marriage solemnized at the *Roman Catholic Chapel of Eastwell.*" He was not pressed when giving his evidence for any explanation of this strange misstatement. He also then made a record of both ceremonies in a book which is in evidence. The petitioner asked him not to record either the baptism or the marriage in the parochial book, and to keep the statutory certificate for at least twelve months, which he did. The alleged marriage was never registered, nor was any attempt ever made to register it.

It is quite inexplicable how the clergyman, knowing well, as he says he did, the provisions as to the solemnization of marriage contained in the decree of the Council of Trent, and being evidently acquainted with the statute law as to registration, could have lent himself to these secret and clandestine proceedings, and to breaches of the law both of his Church and of the State. His condition of mind I am quite at a loss to comprehend. He says that he told the petitioner and made it clear to him that the presence of a priest and two witnesses would be necessary to a valid marriage; but he adds that he believed that the faculties he had obtained from the bishop enabled him to perform the ceremony in the presence of one witness only. On re-examination he, in effect, contradicted this latter statement. He said he "did not think the bishop had given him faculties to dispense with two witnesses,"—that he "believed he had full power to marry with one witness," that he "thought *he* could be a witness," —that the petitioner "trusted him to carry out the marriage properly," and that he now knew "that the faculties did not enable him to dispense with two witnesses." These statements were so contradictory that I drew his attention to them, and asked him if he could explain their apparent inconsistency with each other—but I could extract no intelligible reply from him save that he believed he had power to carry out the ceremony as he did and that he admits he violated a law of the Church.

On his evidence I am satisfied that, so far as the petitioner and respondent are concerned, they contemplated a ceremony that would be valid and binding in the view of both Church and State; and I have no reason whatever for thinking that either of them believed at the conclusion of the rite that they were not legitimately husband and wife.

The later circumstances affecting the relations of the parties may be very briefly stated. The petitioner and respondent cohabited, and a child of that connexion was born in January, 1911. There is no suggestion of any unpleasantness between them in 1910, nor indeed up to March, 1911. Father Fahy up to that retained possession of the certificate that had been signed on the night of the ceremony, and the respondent had written to him asking for her "marriage lines." A correspondence, of an

Kenny, J. 1912.

USSHER v. USSHER.

extraordinary character on the part of the clergyman, then commenced. He seems to have continued on personal and friendly relations with the petitioner, and speaks of a reconciliation being effected between the petitioner and respondent, and states that the petitioner had asked him to keep the marriage secret for some time "because his sisters who have a claim would come down upon him and do him much harm just now," and that he could not at present part with the legal documents in his possession. He writes that the petitioner was then (1st June, 1911) about going up to Dublin to finally arrange furnishing the respondent's new residence,—that the respondent should write a nice letter to the petitioner, who was "a grown child,"—that she should get her solicitor not to proceed with his demand for "marriage paper,"—that the petitioner wished her not to proceed to make matters public—and that he expected "to have matters nicely arranged between those married parties, and that a suitable residence will be completed for Mrs. M. Ussher, so that the parties will become finally reconciled." On the 16th June, 1911, he handed the original certificate to the petitioner. In the meantime the respondent was residing in Dublin under the name of Kelly, which name Father Fahy says she told him she had assumed "in order to keep the matter secret." But while she and her solicitor were endeavouring to obtain from Father Fahy a copy of the certificate, Father Fahy, after hearing, as he says, from his bishop, in the month of May, that the marriage was invalid, was urging the petitioner to go through a further ceremony which was to be effectual in validating, before the Church, the hitherto void marriage. Several interviews took place between them, and the bishop had a correspondence with the petitioner on the subject, but eventually, in the month of September, 1911, the petitioner declined to take any steps to confirm the marriage and the petition was filed in October.

I should add that, according to the evidence of Dr. Gilmartin, the parties could have come before the parish priest, or bishop, with two witnesses, and renewed their consent to be husband and wife, and such renewal of consent would in the eyes of the Church validate the marriage and render the offspring legitimate.

At the conclusion of the evidence given in support of the

petitioner's case, counsel for the respondent asked me for a direction that the parties had been validly married on the 24th April, 1910. I declined at that stage of the hearing so to direct, and pointed out to counsel on both sides that there did not appear to be any controversy as to the material facts, and invited them to consider whether a verdict could be then taken and the special jury relieved from the necessity of listening to the legal arguments. Both sides at once agreed to the jury being discharged after finding the following special verdict, the form of which I settled with the approval of counsel on both sides:—

"That on the 24th April, 1910, a religious ceremony purporting to be one of marriage according to the forms and rites of the Roman Catholic Church, between the petitioner and respondent, they both being Roman Catholics, was celebrated by the parish priest of the parish where both parties resided, at the petitioner's house, but in the presence of only one witness—and that the parties afterwards co-habited."

The jury accordingly so found, and were discharged.

Counsel then addressed themselves to the legal bearings of the case, and three propositions were submitted on behalf of the petitioner, namely—(1) that, inasmuch as there were no statutory provisions regulating the religious ceremony of marriage between Roman Catholics, the test of legal validity was its celebration in accordance with the law for the time being of the Roman Catholic Church, and that as the latter, under the Decree of the Council of Trent, required the presence of two witnesses, a ceremony performed, as in the present case, in the presence of only one witness was void as a matrimonial contract; (2) that a contract of marriage must at law be regarded and interpreted as any other contract would be; that the contract between the parties here was conditional in its nature and essence, inasmuch as the petitioner stipulated for a marriage that would be valid in the eyes of the Catholic Church and that admittedly the alleged marriage did not fulfil that condition and consequently the matrimonial contract was incomplete and nugatory; and (3) that, as the petitioner had been a professing Protestant within twelve months before the alleged marriage, it was not within the competence of a Roman Catholic

Kenny, J. 1912.

USSHER v. USSHER.

clergyman to perform a ceremony binding at law, having regard to the 19 Geo. 2, c. 13.

The second of these propositions was not even suggested in the petition, but it was relied on in the reply to the respondent's answer. The third proposition is not to be found in any of the pleadings, and was not glanced at in the opening statement of the petitioner's case. When it was developed for the first time in counsel's reply, the objection was at once raised that it was not open to the petitioner to rely upon it. I, however, allowed the question to be discussed, although I have great doubt as to the propriety of my having done so,—and I propose to deal with the point as if it had been duly raised in pleading. The issue sent to this Court for trial by the order of my brother Madden, of the 4th December, 1911, is, "Whether the respondent was lawfully married to the petitioner"; and while some inconvenience may be caused by counsel having to discuss a point which probably they did not anticipate, it would on the other hand be highly unsatisfactory to preclude an objection brought forward and pressed as one of gravity.

The petitioner's case is met by the contention that the law by which the validity of the alleged marriage is to be tested is not the marriage law of the Roman Catholic Church, but the Common Law of England and Ireland as same existed and was administered down to the time of the Reformation,—that, so far as the marriages of Roman Catholics *inter se* are concerned, their legality continues to be governed by the same law as before the Reformation,—and that the only requirements to a valid and binding marriage between Roman Catholics capable of contracting are the consensus of the man and woman there and then to become husband and wife—openly expressed in the presence of a priest in holy orders. The respondent also submits that the matrimonial contract which she entered into, though irregular, was unconditional and absolute, and, as to the point based on the statute of Geo. 2, it is contended that the latter has ceased to be in force since the year 1870.

These contentions raise some very interesting and, I am told, novel points, and though no question has been raised by the petitioner's counsel as to the validity at law of marriages of

Catholics in Ireland celebrated by a Catholic priest, it becomes necessary for me to trace as briefly as is possible the developments by which the law has reached what I conceive to be its present state.

Before stating my views, I think it desirable to make one or two observations of general application. The first is that a ceremony—I will not at this stage call it a marriage—such as was performed on the 24th April, 1910, ought not to be, without grave consideration, annulled. The existence or non-existence of the legal marriage tie involves questions of status (*Niboyet* v. *Niboyet* (1), judgment of Brett, L.J.), and, as Butt, J., states in *Sebright's Case* (2), there is, in contracts of marriage, an interest involved above and beyond that of the immediate parties, and public policy requires that marriages should not be lightly set aside. The position of unborn children and the incidental rights to legal recognition in respect of property are deeply involved in the maintenance or avoidance of what purports to be a valid marriage,—and what, to my mind, adds to the serious character of the claim in the present case is, that the petitioner and respondent are members of a church that regards the matrimonial contract as partaking of the nature of a sacrament and invested with peculiar sanctity; that the petitioner must be assumed to have realized that doctrine when he went through the impeached ceremony; and, to use the language so familiar to Chancery lawyers, that up to the celebration of the latter he was "ready, desirous, prompt, and eager" to bring about the particular consequences which would result from a legitimate union.

In dealing with the first proposition of counsel for the petitioner, namely, the necessity of two witnesses to the ceremony of Roman Catholic marriage in order to give it validity in accordance with the law of the State, it will be convenient to consider how that law has stood at different times in the history of England and of this country. A survey of it may be brought within a narrow compass, having regard to its exposition in the two leading

(1) 4 P. D. 1. (2) 12 P. D. 21.

Kenny, J.
1912.

USSHER
v.
USSHER.

cases in the House of Lords of *The Queen* v. *Millis* (1) and *Beamish* v. *Beamish* (2), in which all the research that great legal erudition could offer was displayed; and it would be the merest legal pedantry on my part were I to refer to the grounds on which the very learned persons who considered those cases based their judgments. But I must refer to the differences of opinion that existed amongst the Judges and the Lords, and the nature and binding effect of the pronouncement in each case.

To anyone approaching this subject of the matrimonial law of these islands, the task of inquiry is much facilitated by the Report dated in July, 1868, of a Royal Commission on the Laws of Marriage in the United Kingdom. The Commission issued in March, 1865, and was directed to (amongst others) such great lawyers as Lord Chelmsford, then Lord Chancellor of England; Mr. Justice O'Hagan, subsequently Lord Chancellor of Ireland; Sir James Wilde, the Judge of the Court of Probate in England; Vice-Chancellor Sir W. Page-Wood, afterwards Lord Hatherley; Sir Roundell Palmer, afterwards Lord Selborne, then Attorney-General for England; and Sir Hugh M'Calmont Cairns, afterwards Lord Cairns. The report, which is most valuable reading and very clear and distinct in its proceedings, is signed by all of those whose names I have given, Lord Cairns having then become Lord Chancellor.

I shall consider the state of the law as it stood in pre-Reformation times,—as it was recognized from that period up to the passing of Lord Hardwicke's Marriage Act in England in 1753,—and it has existed in Ireland down to the present day.

The Common Law and the Canon Law of England and Ireland were identical down to the reign of Henry VIII. Both were Roman Catholic countries, as were the principal countries of Western Europe, and all were substantially governed, so far as marriage law was concerned, by the Canon Law as decreed and expounded from Rome. Not that the general Canon Law of Europe was imported as a body of law into this Kingdom, but unquestionably the marriage law of England, as dispensed in her

(1) 10 Cl. & F. 534. (2) 9 H. L. C. 274.

Spiritual Courts, was founded upon it (1). And so far did those latter Courts extend their authority, that eventually they assumed exclusive cognizance in regard to the validity of marriages and were habitually referred to by the King's Courts for their opinion and decision. It may, therefore, be assumed that the marriage law of England was to all intents the Canon Law as administered in the Ecclesiastical Court, sometimes referred to as the "Court Christian." According to its rules there were two classes of espousals leading to a complete contract of marriage with all the incidental results in regard to status and rights of property,—the one being *sponsalia per verba de praesenti*, whereby the spouses declare that they take one another as husband and wife at that very moment,—and the other being *sponsalia per verba de futuro*, whereby they contract to become husband and wife at some future time. It is unnecessary for me to discuss the conditions under which either class of espousal would result in a marriage complete in all its consequences, or the exact legal position occupied by the spouses pending the fulfilment of such conditions, inasmuch as the decision of the House of Lords in *The Queen* v. *Millis* (2), although it has met with disapproval in many quarters from Judges and text-writers, is a conclusive authority binding on every Court in this realm for the proposition that a marriage, however solemnly celebrated, was invalid by the common law unless contracted in the presence of a priest in holy orders. The question in controversy in that case, which arose on a trial at the Antrim Assizes for bigamy, was whether a marriage between a Presbyterian and a member of the Established Church, solemnized in the year 1829 by a Presbyterian minister, was a valid legal marriage. The Presbyterian minister not being a priest in holy orders, it was argued that there was no marriage; while for the Crown it was strenuously contended that the contract between the parties *per verba de praesenti*,—by their declaration of there and then becoming man and wife,—was sufficient to create a valid and binding marriage. The case is a most interesting one, not only because of the importance of the decision, but by reason of the

(1) *See* per Tindal, C. J., 10 Cl. & F. at p. 678.

(2) 10 Cl. & F. 534.

Kenny, J.
1912.
USSHER
v.
USSHER.

difference of opinion amongst the Irish Judges, and subsequently amongst the Lords. In the Court of Queen's Bench in Ireland (1) Perrin and Crampton, JJ., held that there was a valid marriage, while Pennefather, C.J., and Burton, J., were of the contrary opinion. On writ of error to the House of Lords the English Common Law Judges were asked to attend, and Tindal, C.J. (Common Pleas), delivered the unanimous opinion of that body—though not arrived at without doubt and hesitation—that the marriage was invalid. The Lord Chancellor (Lord Lyndhurst), Lord Cottenham, and Lord Abinger concurred in this view; while Lords Brougham, Denman, and Campbell dissented. The House being evenly divided, the rule *semper presumitur pro negante* applied, and judgment was given for the defendant in error,—in effect irrevocably deciding that, as Lord Campbell (then Lord Chancellor) pointed out in the subsequent case of *Beamish* v. *Beamish* (2), "there could never have been a valid marriage in England before the Reformation without the presence of a priest episcopally ordained, or afterwards, without the presence of a priest or of a deacon." The manner and circumstances in which this far-reaching judgment was arrived at, and the momentous character of the decision itself, created a large body of criticism and dissent. So strong, indeed, was the feeling of Lord Campbell on the subject, that he deemed it his duty to resort to the extraordinary proceeding of entering a protest against it in the journals of the House of Lords (3).

The significance of that case in connexion with the present one is this, that throughout the elaborate arguments and judgments, extending over 370 pages of the report (4), there is not a suggestion that in pre-Reformation times either by Common Law or Church Law a witness to a marriage was essential to its validity. Marriages may have been irregular, ecclesiastical penalties may have been incurred, but, with the exception of the Decree of the

(1) *See* Report of the cases *Reg.* v. *Millis* and *Reg.* v. *Carroll* in the Queen's Bench in Ireland in Easter and Trinity Terms, 1842, by Edward Spencer Dix, Esq., Barrister-at-law, Dublin.

(2) 9 H. L. C., at p. 336.

(3) *Beamish* v. *Beamish*, 9 H. L. C., at p. 337.

(4) 10 Cl. & F. 534.

Council of Trent, I can find no provision or regulation either in the Common Law or the Canon Law for nullifying a marriage of Catholics by a Catholic priest on account of the non-presence of a witness at its celebration. The result of Lord Campbell's researches goes still farther, for in the course of his judgment in *Beamish* v. *Beamish* (1) he says :—" But down to the Decree of the Council of Trent the canons on this subject were merely directory without any nullifying clause, and the marriage, although irregular and clandestine, was valid if the contract was proved to have been solemnly entered into between the parties *per verba de praesenti.*"

Beamish v. *Beamish* (1), in which Lord Campbell delivered the judgment I have just referred to, was another Irish case. It was decided in 1861, and involved the question as to whether a Protestant clergyman in orders was competent to marry himself. After great diversity of opinion in this country it was ultimately held by the House of Lords that he could not. The case is principally remarkable for the profound learning displayed by Willes, J., who delivered the opinion of the Common Law Judges who had been called in, and his exhaustive analysis of the law. He accepts, as he was obliged to do, the decision in *The Queen* v. *Millis* (2), but in very clear terms he expresses his disagreement with it. Although he had not to consider the question of witnesses, he touches on the question incidentally. After referring to a Decretal of Alexander III, who was Pope from 1159 to 1181, relating to marriages in England, Willes, J., adds (p. 308) :—" Even if there were no witnesses present at such a marriage, that created a difficulty of *proof* only, and did not affect its *validity.*"

Apart from this very precise statement, it is to be said also of this case that throughout the report there is no allusion whatever to the question of the necessity of witnesses ; and, as to both cases, this further observation may be made, that if the absence of witnesses could operate as a nullifying cause there would have have been no necessity for the elaborate arguments and judgments appearing in the reports.

I am, therefore, satisfied that by the Common Law of England, which was also the Common Law of Ireland, the presence of a

(1) 9 H. L. C. 274. (2) 10 Cl. & F. 534.

Kenny, J. 1912.

USSHER v. USSHER.

witness at a marriage antecedent to the Reformation was not necessary to give it validity.

I come now to post-Reformation times. It is a matter of history that from the time of the Reformation the Roman Catholic Church had ceased to be the national Church of England. Thenceforward the Episcopal Reformed Church became the Church of England, with an episcopacy and clergy separate and distinct from those of the Church of Rome, and, although Lord Brougham in his judgment in *Millis's Case* (1) suggests that the Church of England as then established could not and did not recognize Roman Catholic ordination in the case of priests who had not "recanted," he admits that marriages by such priests had been held clearly valid by the Courts of law, and in that connexion referred to *R.* v. *Fielding* (2); *Rex* v. *Brampton* (3); and *Latour* v. *Teasdale* (4). It is right to add that in the point of view from which he was discussing the question, he regarded the presence of a priest as unnecessary. Lord Lyndhurst, however, gives an unqualified recognition to such post-Reformation marriages in the following paragraph of his judgment (5):—

"Holy orders, according to the law of England, are orders conferred by Episcopal ordination. This was the law of the Catholic Church in this country, and the same continued after the Reformation as the law of the Episcopal Reformed Church, distinguished by the appellation of the Church of England. The mode of conferring these orders is prescribed in the Act of Uniformity, 2 & 3 Edward VI, and 13 & 14 Charles II. Similar laws were passed at about the same periods in Ireland for the regulation of the Church of that country which was founded on the same principles and governed by the same rules as the Church of England. *A marriage celebrated by a Roman Catholic priest, as in Fielding's Case* (2) *and other instances, has been considered valid. A priest of the Romish Church is a priest by Episcopal ordination, and his orders are accounted holy orders by our Church.*"

The case of Robert Fielding (2) (sometimes known as Beau

(1) 10 Cl. & F. 728.
(2) 14 State Trials, 1327.
(3) 10 East, 282.
(4) 8 Taunt. 230.
(5) 10 Cl. & F., p. 861.

Fielding), mentioned in Lord Lyndhurst's judgment, was one of a very romantic and interesting character, and will well repay the reading. It would unduly lengthen my remarks were I to go into the facts of it. It is enough for me to say that the marriage was celebrated in a private room by a Catholic clergyman without witnesses. Fielding went through a subsequent marriage, and, being indicted for bigamy, was convicted, the first marriage being held to be a valid and binding one at law.

I need not particularize any other cases decided before 1753. In that year Lord Hardwicke's Marriage Act, 26 Geo. II, c. 33, which was regarded as a great innovation in English marriage law, was passed. It was an English Act, and it made it felony for any clergyman to celebrate marriage without banns or elsewhere than in a Church, and declared any such marriages to be null and void. It also enacted that two witnesses should be present at a marriage, but no nullifying clause was attached in case of an irregularity in this respect. It was the first effective step taken by the English Legislature for preventing secret and clandestine marriages, although the Catholic Church two centuries previously, after the Reformation, had dealt in a drastic fashion with the subject by the decree of the Council of Trent, which held its sittings at various times between 1545 and 1563. It was stated in the course of the argument that this decree was promulgated in Ireland in either 1830 or 1832, and it has been forcibly recalled to mind by the comparatively recent Papal Decree known as the decree Ne Temere, which, according to the evidence of Father Fahy, was promulgated in this country in 1908, and is now the binding authority in relation to marriage on all Catholics throughout the world except in Germany and Austro-Hungary. The decree of the Council of Trent, as recited in the decree Ne Temere, is, for the purpose of the question raised in the present case, of the simplest character. It enacts that those who otherwise than in the presence of the parish priest or his licensee, or the licensee of the ordinary, and in the presence of two or three witnesses, shall attempt to contract matrimony, are to be altogether incapable of contracting marriage thus, and it "decrees that contracts of this kind are null and void." I have, in an earlier part of my judgment, set forth its precise terms. So far as the Catholic Church

Kenny, J. 1912. USSHER v. USSHER.

is concerned, there can be no question as the to applicability of this decree and as to its effect in the present case. The ceremony of the 24th April, 1910, is, according to the evidence of Dr. Gilmartin, absolutely ineffective as a marriage contract in the eyes of the Church,—the respondent is living in a state of sin,—and the offspring is illegitimate. Had this decree been operative in pre-Reformation times it would have constituted part of the Church discipline as to marriage, and might have been recognized as part of the Common Law of the land; but it came into force as a Church law after England had repudiated the Church of Rome and her authority, and, in the absence of express adoption or equivalent legislation, it could only have effect *in foro conscientiae* and could receive no recognition from the law of the State. The latter proposition admits, in my opinion, of no doubt, but if support in its favour be required, I need only refer to the affirmances of it contained in the judgment of Lord Brougham in *Millis's Case* (1), the opinion of Willes, J., in the *Beamish Case* (2), and the judgment of Crampton, J., in *R.* v. *Burke* (3). It follows as a necessary consequence,—and it is so stated by Lord Campbell in the *Beamish Case* (2),—that unless the Common Law, as it existed before the Reformation, is found to have been altered, of which there is no trace, it continued to be the law of the land governing the validity of marriage down to Lord Hardwicke's Act, with this qualification, that so far as religious ceremony was concerned, the Reformed Church and its ministers were substituted for the Roman Catholic Church; but at the same time, as I have already pointed out, marriages by a Roman Catholic priest continued to be recognized as valid. If, therefore, the same Common Law, with only this qualification, applied as before the Reformation, and if the decree of the Council of Trent was unrecognized by the State, it is clear that in the period I am now speaking of no witnesses were essential to a religious ceremony of marriage.

But in Ireland the circumstances are, if anything, stronger. As I have endeavoured to show, the Common Law of England, which did not nullify a marriage by reason of the absence of

(1) 10 Cl. & F., at p. 721.
(2) 9 H. L. C., at p. 320.
(3) 5 Ir. L. R., at p. 556.

witnesses, was the Common Law of Ireland (1), and in many respects the Statute Law of Henry VIII and Elizabeth with regard to marriage in England had its counterpart in this country. The 33rd Henry VIII, c. 6 (Irish), is the equivalent of 32nd Henry VIII, c. 38, and 1 Elizabeth, c. 1, section 11 (English), which dealt with prohibited degrees and dispensations, and in the case of *R.* v. *Burke* (2), already referred to, which was one in which there had been a marriage between Roman Catholics solemnized by a Roman Catholic priest, and in which it was contended that the language of the Irish Act was confined to Protestants and that Catholics were excluded from its operation, it was, in effect, held that such a marriage was valid. Burton, J., in his judgment says: "Now there is not at present anything in the statute respecting the members of the Roman Catholic persuasion to render invalid an actual marriage not within the prohibited or Levitical degrees as established by the statute of Henry VIII."

Furthermore, the Acts of the 19 Geo. II, c. 13 (Irish), and 7 & 8 Vict. c. 81, 33 & 24 Vict. c. 110, and 34 & 35 Vict. c. 49, sections 25 and 27 (all of which extended only to Ireland), clearly recognized such marriages as valid, and it cannot be forgotten that the celebrated case of *Thelwall* v. *Yelverton* (3), tried in this very Court in the year 1862, where a marriage by a Catholic priest was relied on, would have presented no difficulty if the question as to Major Yelverton's having been a professing Protestant within twelve months before the Irish marriage had not been in controversy. In the course of this legislation there is no suggestion of the necessity for witnesses to a marriage of Catholics by a Catholic clergyman, and no single case that I have been able to find has even an allusion to it.

From what I have said the following propositions may be stated:—

1. The Common Law of England and Ireland relating to marriages were identical up to the Reformation, and the marriage

(1) *Per* Lord Campbell, 10 Cl. & F., at p. 750.

(2) 5 Ir. L. R. 549.

(3) 14 Ir. C. L. R. 188. See judgment of Christian, J., at p. 194.

Kenny, J. 1912.

USSHER v. USSHER.

ceremony by a minister in holy orders required no witness for its validity.

2. Since the Reformation the marriages of Roman Catholics by a Roman Catholic clergyman have continued to be deemed valid notwithstanding the change in the National Church, and are governed by the same Common Law that theretofore existed, and;

3. Such marriages are in law unaffected by the Decree of the Council of Trent, and therefore, exempt from the necessity for witnesses.

My conclusions differ in no respect from those at which the Commission on the marriage laws of the United Kingdom, to which I have already referred, arrived in the year 1868. The report deals separately with the marriage laws of England and Ireland, and also separately with marriages of the Established Church and those of other churches. In treating of *English* marriage law,—after showing what were the powers of the clergy of the Established Church,—it states that "the law offers to those of your Majesty's subjects who may not desire to be married according to the rights of the Established Church, the alternative of marriage *according to the usages of any other denomination*, or marriage by purely civil ceremony . . . . Both in the Registrar's office and in registered buildings the marriage must be celebrated in the presence of two witnesses" (1). The report then turns to *Irish* marriages, and, after pointing out that with respect to marriages other than those by the Established Church there is an extensive divergence between the laws of the two parts of the United Kingdom, states that until the year 1863, when the Registration of Marriages (Ireland) Act, 1863, was passed, "marriages between two Roman Catholics . . . were left to the operation of the Common Law without any statutory enactment; and so far as relates to the legal constitution of marriages between such parties this is still the case:—the provisions of the Act passed in that year (26 & 27 Vict. c. 90) being directory with a view

(1) Report of the Royal Commission on the Laws of Marriage, pp. vii, viii.

to the registration only of such marriages" (1). The report proceeds (2) :—

"By the Common Law (as determined by the House of Lords in the celebrated case of *The Queen* v. *Millis* (3)), the presence of a clergyman in holy orders, either of the Roman Catholic or of a Protestant Episcopal Church, at the time of solemnization was essential to the valid constitution of the contract of marriage, but a marriage solemnized by any such clergyman, whether publicly or privately,—at whatever time or place, and in whatever form or manner between parties competent to intermarry,—was valid without any previous publication of banns, license, notice, residence or consent, *and this is still the law of Ireland as to all Roman Catholic marriages.*"

The report then refers to the provisions of the Decree of the Council of Trent, and continues as follows (2) :—

"Of these matters, however (being requisites of marriage by the internal economy only of the Roman Catholic Church), the law takes no cognizance ; and a marriage contracted in the presence of any Roman Catholic priest in Ireland, between two Roman Catholics, *although contrary to the law and discipline of their own Church*, would be legally valid."

On these authorities I am forced to the conclusion that the law by which this case is to be governed is the Common Law of England and Ireland as the same was understood and administered up to the time of the Reformation, and that, although marriages of Catholics by Catholic clergymen in this country are fully recognized by the State, that recognition is not confined to marriages that would be regarded by the Catholic Church as valid, but extends to marriages the validity of which, if they had been celebrated in pre-Reformation times, would have been open to *no* question of Common Law.

I am, therefore, of opinion that the contract and ceremony which took place between the petitioner and respondent on the 24th April, 1910, was not invalidated by reason of the absence of two witnesses.

(1) Report of the Royal Commission on the Laws of Marriage, p. xii.

(2) *Ibid.*, p. xiii.

(3) 10 Cl. & F. 534.

Kenny, J.
1912.

USSHER
v.
USSHER.

But it is contended that this contract was only a conditional one, the condition being that the petitioner was to be united to the respondent in wedlock by a marriage which would be recognized by the church of which they were both members. If there was such a term of the contract it is clear that it has not been hitherto fulfilled; but coming from a party who has absolutely declined to now validate the marriage in the eyes of the Church, it is not a point that commends itself to one's sympathy. The intention of the parties to be validly married, both legally and ecclesiastically, is manifest; and the form of marriage service which they went through establishes that, so far as words could go, the petitioner there and then took the respondent as his lawful wife and she took him as her lawful husband "till death us do part." The clergyman purported solemnly to join them in marriage; blessed the wedding ring and the money offered by the bridegroom; and this portion of the ritual was brought to a conclusion by the petitioner placing the ring on the respondent's finger. The petitioner and the respondent then signed the certificate for registration purposes, in which they declare—"This marriage was solemnized between us, William Arland Ussher and Mary Caulfield." But, because there was only one witness to this ceremony and the intention to be married in accordance with the laws and regulations of the Church has thereby been defeated, is it to be therefore held that a marriage, otherwise legal according to the law of the realm, is to be declared null and void? The petitioner strongly relies on the words of the marriage service—"if Holy Church will it permit"—as qualifying what might be supposed to be an absolute matrimonial contract. It is contended that the matrimonial contract differs in no way as to its incidents from an ordinary contract, and is therefore subject to the difference in effects between one that is absolute and one that is conditional. In my opinion, the alleged conditional contract in the present case is not a conditional contract in any sense, nor is the matrimonial contract in every case to be construed as an ordinary contract would be construed. The petitioner's case on this branch of the argument simply is, that he stipulated for a perfect ecclesiastical marriage,—in other words, for a marriage with two witnesses, and that he did not get it. Whose fault was it that he did not? He had

been told in clear language that two witnesses would be necessary. He provided only one, and was quite prepared to and did go through a marriage ceremony without having another. It is no answer to that, that the reverend gentleman who performed the ceremony ought to have seen that there were two. It was the petitioner's own act that the marriage was invalid in the eyes of the Church. It is clear to me that though he wished to be effectually married, both in law and in conscience, he completely waived any condition with reference to the latter, and made up his mind to take the risk of any irregularity. I cannot, on the evidence, for a second believe that he, at the conclusion of the ceremony, contemplated any additional act effectually to complete the relation of man and wife between him and the respondent. But, apart from the question of waiver, it would, in my opinion, be contrary to public policy, having regard to the status resulting from a valid marriage, to allow such a point to prevail, for it might open a door to the challenging of every marriage which, by reason of some small irregularity or otherwise, afforded an opportunity to one of the parties of alleging that he or she contemplated something different from that which had actually taken place. A similar observation applies to the argument based on the words of the marriage service. The words "if Holy Church will it permit" could not, in my judgment, be interpreted as amounting to the imposition of a condition on an otherwise valid contract. If it did, then every marriage performed with this ritual could be regarded as merely conditional at the will of either party.

But there is another reason which I regard as insuperable, namely, that following on this ceremony the parties lived together as husband and wife. That ancient work, published in 1686, known as Swinburne on Espousals, p. 129, has been cited as showing that a promise to marry "if it shall please the Church" may be merely a conditional contract; but this particular paragraph in Swinburne takes no account of two essential objections to such a conditional contract mentioned elsewhere in the work, the one being that such a condition would be against the substance of matrimony (p. 139), and the other being that consummation followed on the ceremony; Swinburne remarking (p. 121), "for

Kenny, J. 1912. USSHER v. USSHER.

by this they are deemed to have renounced the condition." Lord Brougham's judgment in *Millis's Case* (1) has also been referred to. He was dealing with the effect of marriages *per verba de praesenti*, and supposed a case where the parties married civilly with the intention that there should afterwards be a religious ceremony,—a regular marriage *in facie Ecclesiae*. Such a contract, he points out, by consent of the parties made to depend for its validity on the subsequent religious solemnity, may be incomplete until the condition is fulfilled. But he adds that such a contract, though incomplete, may be *indissoluble*.

The cases of *Scott* v. *Sebright* (2), and *Steuart* v. *Robertson* (3), cited by Mr. Campbell, are merely illustrative of a marriage being annulled, in the one case on the ground of fraud, and, in the other, on the ground of a complete absence of any intention on the part of the lady to go through the ceremony of marriage, she being under the impression that the ceremony was an espousal and not a binding contract.

I have, therefore, arrived at the conclusion that from no point of view could this contract be regarded as conditional.

The remaining point is one that I feel difficulty in appreciating. It is said that inasmuch as the Irish Act, 19 Geo. II, c. 13, declared a marriage by a "Popish priest" of a "Papist" and a person who professed himself to be a Protestant within twelve months before the alleged marriage, or of two Protestants, to be null and void, such a marriage would certainly be invalid up to 1870, when the Act 33 & 34 Vict. c. 110, was passed, and that the 39th section of the latter Act, which purports to repeal that portion of the Act of Geo. II which I have just referred to, has not the effect which its language would lead one to think it had, and that it leaves untouched the case of a Catholic who had been a Protestant within twelve months. The petitioner here had been a Protestant within the twelve months, and up to the passing of the Act of 1870 such a marriage as the present would have been null and void. But that invalidity was created for the first time by the Act of Geo. II. Up to that statute a marriage

(1) 10 Cl. & F., at p. 708.
(2) 12 P. D. 21.
(3) 2 H. L. Sc. & D. 494.

Kenny, J.
1912.
USSHER
v.
USSHER.

celebrated by a Catholic clergyman between two Catholics, one of whom had been a Protestant, was perfectly valid. The Act of 1844 (7 & 8 Vict. c. 81) did not in its 3rd section refer to any marriages unless those that might then be lawfully celebrated by a Roman Catholic priest; and it was not until 1870 that this nullifying section of the Act of Geo. II ceased to exist. It seems to me that the Act of 1870 is a complete and express repeal of the Act of Geo. II, and that the invalidity created by that Act came to an end in 1870, with the result that the marriage conditions existing before the Act of George again became applicable, and the penalty of nullity and avoidance no longer attached.

My judgment, accordingly, on the whole case is that the marriage which purported to be solemnized under the circumstances found by the special verdict between the petitioner and respondent on the 24th April, 1910, is a valid legal marriage; that the petition do stand dismissed; and that the petitioner do pay the respondent's costs of this suit.

K. B. Div.
1912.
Feb. 20–24.

The present application was on behalf of the petitioner for an order that the judgment and decree had and entered for the respondent might be set aside, and that judgment and decree be entered for the petitioner upon the grounds that the petitioner and respondent were not lawfully married, and that the alleged ceremony of marriage proved at the said trial was null and void, and that the learned Judge should have so directed.

Henry, K.C. (with him *Chaytor, K.C., A. M. Sullivan, K.C.*, and *Swayne*), for the petitioner:—

What the parties contemplated and stipulated for was a marriage valid by the law of the Roman Catholic Church, of which they were both members, as well as by the law of the land—a marriage conferring a sacrament. This was an essential condition of the contract, and, not having been fulfilled, owing to non-compliance with the provision in the decree of the Council of Trent (*Decretum de Reformatione Matrimonii*) requiring two witnesses in addition to the priest, there was no legal marriage. The parties never intended to enter into a marriage where their cohabitation would involve living in sin in the eyes of the Church

K. B. Div. 1912.

USSHER v. USSHER.

and the opinion of their co-religionists. To constitute marriage the inward intention of the parties must accord with their words and acts: *Steuart* v. *Robertson* (1). [Lord O'Brien, L.C.J.:—Can a man repudiate the marriage after there has been cohabitation, and a child has been born?] Yes, if, as here, he repudiates as soon as he learns of the invalidity. If the Court were to hold this marriage good, the result would be that the parties could be compelled by the law of the land to cohabit, although such cohabitation would be regarded as sinful by the Church to which both belong.

The words in the ritual, "If Holy Church will it permit," make the marriage conditional on its being in accordance with the law of the Roman Catholic Church. These words precede the plighting of troth, and govern all that goes before. The meaning of the words is made clear by the form in the Sarum Use—"If Holy Chyrche it wol ordeyne," that is, will pronounce the parties man and wife. The religious ceremony is not complete until the priest pronounces the words, "*Ego conjungo vos*," &c. It is unnecessary to consider at what stage of the ceremony, if the priest stopped there, there would be sufficient consent to constitute a valid civil marriage. Here the whole ritual was gone through, and it must be taken as a whole, including the qualifying words.

It is necessary to the validity of a marriage between Roman Catholics in Ireland, that the requirements of the law of the Roman Catholic Church should be complied with. Prior to 7 & 8 Vict. c. 81, there were no statutory provisions regulating such marriages. Their validity in pre-Reformation times depended on their being valid according to the law of the Church, with the superadded condition that a priest should be present: *The Queen* v. *Millis* (2); *Beamish* v. *Beamish* (3). The Common Law did not recognize as valid a marriage not valid according to the law for the time being of the Church. It was necessary that both modes of obligation should exist together, the civil and the religious; the religious ceremony varying from time

(1) 2 H. L. Sc. & D. 494, at p. 534.
(2) 10 Cl. & F. 534.
(3) 9 H. L. C. 274.

to time according to the variation of the laws of the Church: *Beamish* v. *Beamish* (1); *per* Tindal, C.J. (p. 655). Section 3 of 7 & 8 Vict. c. 81 enacts that nothing in the Act is to affect any marriages by any Roman Catholic priest "which may now be lawfully celebrated," and provides that such marriages may continue to be celebrated "in the same manner and subject to the same limitations and restrictions" as if the Act had not been passed. The words "lawfully celebrated" mean, it is submitted, lawfully celebrated according to the law of the Roman Catholic Church. Otherwise no meaning is given to the words "subject to the same limitations and restrictions." The statute, in sections 4 and 12, recognizes the marriage forms and usages of Presbyterians, Quakers, and Jews; section 3 was intended as a similar statutory recognition of the Roman Catholic law of marriage, subject to the restrictions imposed by that law. The form of certificate of a Roman Catholic marriage, referred to in section 11 of 26 & 27 Vict. c. 90, and set out in the schedule to that Act, contains the words, "according to the Rites and Ceremonies of the Roman Catholic Church": a further statutory recognition of these rites and ceremonies.

But assuming that the words in section 3 of 7 & 8 Vict. c. 81, "which may now be lawfully celebrated," mean lawfully according to the law of the land, and that such law does not recognize the law of the Roman Catholic Church, the marriage is still void. The petitioner here had been a Protestant within twelve months before the ceremony. Such marriage therefore would have been void at the time of the passing of 7 & 8 Vict. c. 81, by reason of the provisions in section 1 of 19 Geo. II, c. 13 (Ir.); no doubt these provisions were repealed by 33 & 34 Vict. c. 110. But this does not affect section 3 of 7 & 8 Vict. c. 81, in which the word "now" stereotypes the law as it stood when that statute was passed, and confines the operation of the section to marriages which might *then* have been lawfully celebrated. Section 42 of 33 & 34 Vict. c. 110, provides that except where the provisions of 7 & 8 Vict. c. 81, are expressly altered by or at variance with the Act, nothing therein contained

(1 9 H. L. C. 274.

K. B. Div. 1912. USSHER *v.* USSHER.

is to affect such provisions; and the Act of 33 & 34 Vict. c. 110, is to be considered as incorporated with the Act of 7 & 8 Vict. c. 81.

Sergeant Moriarty, *K.C.*, and *Carrigan*, *K.C.* (with them, *D. J. O'Brien*), for the respondent:—

It is absurd to suggest that the predominant intention of the petitioner was to have a marriage valid according to the law of the Roman Catholic Church, in face of the fact that he refused to have the marriage validated by that law. According to the evidence of the bishop, Dr. Gilmartin, this could have been done by the parties coming before the parish priest with two witnesses and renewing their consent, which would have validated the marriage as from its original date; or it could have been validated by a dispensation from Rome, so long as the consent remained. There is no finding in the verdict that the marriage was subject to any such condition as is alleged, and no question was left to the jury as to this. No doubt Kenny, J., in his judgment states that he was satisfied that the petitioner and respondent contemplated a ceremony that would be valid and binding in the view of both Church and State; but he had no power to draw inferences of fact, nor has this Court. The petitioner did not venture to go into the box and swear that what he wanted, what was his predominant intention, was to have a marriage valid according to the law of the Roman Catholic Church. Father Fahy had made it clear to him that two witnesses, in addition to the priest, would be necessary to a valid marriage according to that law, yet he consented to being married with one witness only. What the petitioner really wanted was a form of marriage which would enable him to get possession of the body of this woman. After he had lived with her for over a year, and a child had been born, someone suggested to him for the first time this point of the marriage being conditional on its being valid by the law of the Church. Everything is to be presumed in favour of a marriage solemnly contracted, and the strongest evidence is necessary to rebut the presumption of consent: *Harrod* v. *Harrod* (1); *Cooper* v. *Crane* (2); *Piers* v. *Piers* (3); *In re Estate of M'Loughlin* (4).

(1) 1 K. & J. 4.
(2) [1891] P. 369, at p. 377.
(3) 2 H. L. C. 331, at p. 350.
(4) 1 L. R. Ir. 421, at p. 425.

But even if the verdict had found that the contract of marriage was subject to the condition relied on, this would not have affected its validity, at all events after co-habitation: Swinburne on Espousals, pp. 83, 84, 121. Marriage is more than a mere contract; it is a *status* arising out of contract. Deception, except as to the person, thus showing there was no consent at all, does not invalidate it: *Moss* v. *Moss* (1), *per* Sir F. Jeune; Ayliffe's Parergon, p. 362. It is said that the petitioner repudiated the marriage as soon as he learned that it was invalid by the law of the Church. But there is no finding, and no evidence, as to this.

It is contended that what the parties stipulated for was a marriage which would confer a Sacrament, and that they did not get this. But they did get it. The parties administer the sacrament to themselves, the contract itself being the Sacrament: see the evidence of Bishop Moriarty, Report of Royal Commission on Marriage Laws of United Kingdom, p. 104. The priest does not confer the Sacrament. By the Canon Law, before the decree of the Council of Trent, the presence of a priest was not necessary at marriage. Even under that decree its terms were satisfied if the priest was present, although he took no part in the ceremony, and even though he dissented from it: *Beamish* v. *Beamish* (2), *per* Willes, J., p. 319. By canon 8 of the decree *Ne Temere*, where the authorized priest cannot be had, and this state of things has lasted for a month, there may be a valid marriage by the parties declaring their consent in the presence of two witnesses, without a priest. The function of the priest is to give a religious character to the ceremony; to see that the interchange of consents is regularly and properly made; and to prevent prohibited marriages, *e.g.*, those within the prohibited degrees: *Beamish* v. *Beamish* (6), *per* Willes, J., pp. 303, 304, 315.

The words, "If Holy Church will it permit," refer only to the immediately preceding words in the ritual. They relate not to the creation but to the continuance of the married state. The decree of the Council of Trent specifies several circumstances in which the state of wedlock is not permitted to continue. That

(1) [1897] P. 263, at p. 267. (2) 9 H. L. C. 274.

K. B. Div. 1912.

USSHER v. USSHER.

the words are not essential is shown by the fact that they do not occur in the old York rite, nor in the Rituale Romanum, nor the form used in the United States. The interchange of consents before the priest, the two "I wills," constitute a good marriage. The rest is mere surplusage. The concluding words pronounced by the priest, "*Ego conjungo vos*," &c., merely amount to a blessing, and are not essential. By the decree of the Council of Trent the priest is allowed to use other words—*Vel aliis utatur verbis juxta receptum uniuscujusque provinciae ritum.* The words in the earlier part of the ceremony "according to the rite of our Holy Mother the Church," merely mean according to the ritual.

There was a good marriage here according to the law of the Church. The requirement in the decree of the Council of Trent of two witnesses goes merely to the proof of the marriage. The words "null and void" in the decree cannot be read in their strict legal sense, since a marriage without witnesses can be subsequently validated as from its original date, as stated by Dr. Gilmartin in his evidence. The decree must be taken with a saving clause in favour of innocent parties. There is no finding by the jury that the marriage was invalid by the law of the Roman Catholic Church.

But, assuming that the marriage is void by the law of the Church by reason of there being only one witness present, there was a valid marriage by the law of the land. As pointed out in the Report of the Royal Commission on the Laws of Marriage (1868), p. xii, marriages between two Roman Catholics, so far as relates to the legal constitution of marriage, are left to the operation of the Common Law. The only requirement of the Common Law was the interchange of consents in the presence of a priest: *Beamish* v. *Beamish* (1), *per* Willes, J., p. 316. No witnesses were required other than the clergyman: *Ib.*, pp. 324, 325. It is ridiculous to suggest that by a mere saving clause in sect. 3 of 7 & 8 Vict. c. 81, or by a few words to be found in an obscure schedule to 26 & 27 Vict. c. 90, the Legislature intended to make the legal validity of Roman Catholic marriages depend on the law from time to time in force

(1) 9 H. L. C. 274.

in the Roman Catholic Church. Such a view is in direct conflict with the statement in the Report on the Marriage Laws, that until the year 1863 marriages between two Roman Catholics were left to the Common Law, and that so far as related to the legal constitution of marriage this was still the case; the provisions of 26 & 27 Vict. c. 90, being directory, with a view to the registration only of such marriages. Section 27 of the last-mentioned Act expressly provides that nothing contained therein shall affect the law of marriage in Ireland. The Report refers to the requisites of marriage prescribed by the decrees of the Council of Trent, and goes on to say that of these matters the law of the land takes no cognizance; and that a marriage contracted in the presence of any Roman Catholic priest in Ireland, between two Roman Catholics, although contrary to the law and discipline of their own Church, would be legally valid. The limitations and restrictions mentioned in section 3 of 7 & 8 Vict. c. 81, refer not to those imposed by the Roman Catholic Church, but to those that affect all marriages, *e.g.*, that the parties must be of competent age, &c.

Stress has been laid upon the hardship which would result from the parties being liable to be compelled by the law of the land to cohabit, when such cohabitation would be regarded as sinful by the Church. But this must always happen where the marriage law of the State differs from that of the Church. In *Reg.* v. *Burke* (1) it was held that there was a good marriage according to the law of the land, although there was no marriage according to the law of the Roman Catholic Church. In the present case the petitioner cannot complain of any such hardship, since he can now, if he wishes, have the marriage made a valid marriage by the law of the Church, in the manner pointed out by Dr. Gilmartin. There is the hardship, on the other hand, if this marriage were held void, that the respondent would be declared no wife, and her child illegitimate.

It is argued that although the provision in section 1 of 19 Geo. II, c. 13, nullifying marriages celebrated by a Roman Catholic priest between a Roman Catholic and a person who has been a Protestant within the preceding twelve months, has been

(1) 5 I. L. R. 549.

K. B. Div. 1912.

USSHER v. USSHER.

repealed, yet that section 3 of 7 & 8 Vict. c. 81, is to be read as if that provision still existed. This is directly contrary to the well-settled rule of construction of statutes, that a statute when repealed is to be treated as if it had never existed. Moreover, there is no finding here that the petitioner had been a Protestant within the preceding twelve months.

Chaytor, K.C., in reply.

Cur. adv. vult.

April 20.

LORD O'BRIEN, L.C.J. :—

The question to be determined in this case is, whether the petitioner, William Arland Ussher, and the respondent, Mary Ussher, otherwise Caulfield, were lawfully married. The material facts are as follows :—

At about 10 o'clock at night on the 24th April, 1910, the petitioner went through what purported to be a ceremony of marriage with the respondent. Both the petitioner and the respondent were Roman Catholics at the time of the alleged marriage ; upon this hypothesis the petition was presented. The ceremony, which is impugned as invalid, was performed by the Rev. Joseph Fahy, parish priest of the parish where they resided. The petitioner lived at a place called Eastwell, in the county of Galway, and the respondent was a housemaid in his establishment. The petitioner was about thirty years of age and the respondent about twenty. The petitioner had been born a Protestant, and had up to the date of the ceremony professed the Protestant religion ; but immediately before the alleged marriage took place he had been received into the Roman Catholic Church. The ceremony was performed in accordance with the ritual, so far as it is expressed in words, of the Roman Catholic Church, but in the presence of one witness only—a woman of the name of Agnes Kavanagh, who was a cook in the petitioner's house. It appears that both the reception into the Roman Catholic Church and the ceremony of marriage took place in an unused bedroom at Eastwell, into which the Rev. Joseph Fahy was secretly introduced at night by the petitioner.

It was argued before us that this marriage was invalid by reason of the fact that only one witness thereto was present, and that it was invalid ecclesiastically and legally, both in the eye of the Roman Catholic Church, and in the eye of the law of the realm, the Common Law. The prohibitive and penal statute, the 19th Geo. II, c. 13, was referred to as invalidating the marriage.

There was an added, I might say, a special, ground of impeachment of the marriage; it was alleged to be subject to the condition that if the ceremony which was gone through was not effective as a valid marriage in the eye of the Roman Catholic Church, it was to be regarded as altogether invalid. The Rev. Joseph Fahy, who was examined at the trial, stated that he told the petitioner (who was not produced to give evidence) that two witnesses to the marriage were necessary; but afterwards alleged that he thought that a faculty which he got from his bishop, the Most Rev. Dr. Gilmartin, dispensed with the necessity of two witnesses, and rendered the presence of but one witness sufficient. As to this the Rev. Joseph Fahy lapsed into very great confusion. It is not now denied that the faculty from the bishop was confined merely to the authorization of the celebration of the marriage in a private house. The marriage certainly took place before but one witness, Agnes Kavanagh, the cook. The persons present were only four in number—viz., the petitioner, the respondent, the cook Agnes Kavanagh, and the Rev. Joseph Fahy. The ceremony of marriage was, as I have stated, gone through in the words (all the words having been used) of the Roman Catholic ritual. Did the fact that there was but one witness present invalidate the marriage from the standpoint of the Roman Catholic Church? In my opinion it did. The Decree of the Council of Trent has been promulgated in Ireland; it is applicable to and controls Roman Catholic marriages, and makes the presence of two witnesses necessary. A ceremony not in accordance with its requirements as to the presence of a priest and two witnesses is null and void. Not only is the marriage declared null and void by the Decree of the Council of Trent, but the parties purporting to contract are declared incompetent to do so, *omnino inhabiles ad contrahendum*. That is to say, the marriage is rendered invalid

K. B. Div. 1912. USSHER v. USSHER. Lord O'Brien, L.C.J.

not by reason of any incompetency of a personal character attaching to, naturally inherent in, the persons purporting to contract, but by reason of the non-compliance with the external requirements, that is to say, the presence of the two witnesses rendered necessary by that Decree. It must be borne in mind that the Decree of the Council of Trent, though coercive and conclusive from the standpoint of the Roman Catholic Church, is not recognized by the law of the land, the Common Law. We must bear this distinction in mind when dealing with the question whether the marriage with which we are here concerned was good at common law. It is unnecessary to consider how, from the point of view of the Roman Catholic Church, a subsequent "validation" of the marriage would operate. The word "validation" is used, but what it really, essentially is, and how it precisely acts, I decline to speculate. No such thing has taken place in this case, nor has any such thing been attempted; in fact, the petitioner refused to give the consent said to be necessary for such "validation."

But, as was asked with much emphasis by counsel during the argument, how could the marriage be validated if it was altogether void? Such a proposition, it was contended, finds no support from "reason." I am afraid there are many things lying at the root, at the foundation, of the Christian religion, mysteries of faith, for an elucidation of which we should appeal to "reason" in vain. The incredulity of scepticism is caused by making "reason" the sole and exclusive touchstone of faith. One thing, however, "reason" imperatively impresses: that, such are the difficulties which beset every form of the Christian religion, we should, no matter how great our devotion to the faith of our fathers, practise forbearance and toleration towards all men within the Christian fold, whatever their distinctive tenets may be. It is sufficient for me to say that the Decree of the Council of Trent, which has been promulgated in Ireland and forms part of the Roman Catholic Faith, declares a marriage with but one witness to be null and void, and no "validation" has been even attempted.

I now turn from the law of the Roman Catholic Church to the law of the land, the Common Law. What, then, was regarded as a Common-Law marriage? Marriages that were made without

formalities (see "The Catholic Encyclopædia," vol. ix, page 692, col. 1), but by the mere consent of the parties, were at one time regarded by many as Common-Law marriages. In order to have made such marriages effective there should have been a present intention to make the contract, and it should have been expressed accordingly; in other words, *per verba de praesenti*. This was accepted, as I have said, by many as the true view of the essential conditions of marriage at Common Law before the well-known case of *Regina* v. *Millis* (1); it rested on the maxim, *Consensus facit matrimonium*. Then came the case I have mentioned—that of *Regina* v. *Millis* (1)—which was very elaborately argued, but in which, nevertheless, the noble and learned Lords who heard it were equally divided in opinion as to whether the presence of a clergyman in holy orders was essential to the validity of a Common-Law marriage. Next we have the equally well-known case of *Beamish* v. *Beamish* (2), in which the House of Lords showed that, by virtue of the rule *Semper praesumitur pro negante*, the decision in *Regina* v. *Millis* (1) made the presence of a clergyman in holy orders necessary to the validity of a Common-Law marriage. (See Lord Campbell's judgment, pages 338, 339, 9th H. L. C.) He dealt with the matter at some length, and concluded his observations as to this head of his argument by saying:—"It is my duty to say that your Lordships are bound by this decision (*i.e.*, the decision in *Regina* v. *Millis* (1)) as much as if it had been pronounced *nemine dissentiente*" (page 338). Later on he says that it was "settled by that case that, to constitute a valid marriage by the *Common Law* of England there must be present a clergyman in orders conferred by a bishop." Lord Chelmsford is also reported to have said in the same case—"*The Queen* v. *Millis* (1) must be taken to have settled that *at Common Law* marriage was invalid unless contracted in the presence of a priest in holy orders"; and, to refer to the antecedent judgment of Lord Cranworth, it will be seen that he laid down that "according to the Common Law of England and Ireland a marriage celebrated without the presence of a clergyman in holy orders was not merely irregular, censurable, and punishable, but was absolutely void."

(1) 10 Cl. & F. 534. (2) 9 H. L. C. 274.

K. B. Div. 1912. USSHER v. USSHER. Lord O'Brien, L.C.J.

Now, why do I refer to these passages from the judgments of these noble and learned Lords? For this reason, that they deal with *the law of the land, the Common Law*; and because the Rev. Joseph Fahy, as has not been denied, fulfils the necessary conditions as to being a priest in holy orders. The substance, the essential conditions, of a valid marriage at Common Law are what we have here. The contracting parties, intending then and there to get married, interchanged their mutual consent, the one to be husband, the other to be wife, in the presence of a priest in holy orders. By the word "priest" I mean not a mere physical sacerdotal entity, but a clergyman present to elicit and receive the consent of the contracting parties; to see that they intended to get married, and mutually understood each other, and who might act as a witness of the marriage if necessary. Here not only were *verba de praesenti* used, but, as I have already stated, the whole of the Catholic ritual, so far as it is expressed in words, was gone through. There was here the essence, the substance, of a Common-Law marriage, clothed, as it were, in ecclesiastical garments. I find that in treatises on marriage law the priest is styled "the official witness," the *testis qualificatus*. At Common Law the presence of any other witness was unnecessary to constitute a valid marriage. The other witnesses essential under the Decree of the Council of Trent, but not essential at Common Law, were styled the *formal* witnesses. I am, therefore, of opinion that there was a good and valid marriage, according to the law of the land, the Common Law, between the petitioner and the respondent. It is not necessary to refer to those exceptional circumstances, such as a marriage at sea, or a case in which it is impossible to secure the presence of a priest, mentioned by Lord Cranworth and by Lord Wensleydale in their respective judgments in *Beamish* v. *Beamish* (1), and in the Decree *Ne Temere*, which dispense with the necessity for the presence of a priest; such circumstances did not exist in the present case. Before I leave this part of the case, I desire to refer to the Report made on the Marriage Law of the United Kingdom, dated 1868; perhaps the most authoritative report (whether in regard to

(1) 9 H. L. C. 274.

the position and qualifications of the signatories to it or of the witnesses examined before them) that was ever presented to either House of Parliament. Amongst the signatories were five Lords Chancellors, four English and one Irish; and among the witnesses were several Roman Catholic bishops, both English and Irish. The division under the head of "Roman Catholic Marriages" consists of six short clauses, so succinct that their very succinctness causes me some compunctious visitings lest my observations be too great a trespass on the public time. All these clauses are relevant, but I will refer only to Clauses 1 and 6, which are as follows:—

Clause 1.—"Until the year 1863 marriages between two Roman Catholics (being the great majority of the whole number of marriages annually solemnized in Ireland) were *left to the operation of the Common Law*, without any statutory enactment; and, so far as relates to the legal constitution of marriage between such parties, this is still the case; the provisions of the Act passed in that year being directory, with a view to the registration only of such marriages."

Clause 6, after referring to the Council of Trent, the publication of banns, and dispensation with them by episcopal licence, continues as follows:—

"Of these matters, however (being requisites of marriage by the internal economy only of the Roman Catholic Church), the law of the land takes no cognizance; *and a marriage contracted in the presence of any Roman Catholic priest in Ireland between two Roman Catholics, although contrary to the law and discipline of their own Church, would be legally valid.*"

My brother Kenny most appropriately referred to these among other clauses of the Report; but there is one other antecedent clause, at page 3 of the Report, to the concluding lines of which, as I think them apposite, and entirely right, I shall refer. They are as follows:—

"In both countries (England and Ireland) provision is made for a general registry of marriages with a view to their greater publicity and more authentic proof; but the *validity* or *proof*

K. B. Div. 1912.

USSHER v. USSHER.

Lord O'Brien, L.C.J.

of marriage is not made dependent upon such registration or upon any other particular kind of evidence."

Now I come to what I called the added, the special, objection which was so strenuously pressed at the Bar. Herein, indeed, lay the stress of the contention between the parties. It was said that the ceremony proceeded on the basis that the consent of the petitioner was given upon the condition that, if the alleged marriage was not a good marriage according to the doctrine of the Roman Catholic Church, the ceremony gone through should be regarded as in no way binding, and that the petitioner should not be regarded otherwise than as an unmarried man; that the ceremony he went through should be good and binding as a valid marriage in the eye of the Roman Catholic Church, or be no marriage at all. That, as it were, he should be bound only by the tie he purported to put on; that, in fact, if not bound by that tie, it would be competent for him to fling the respondent aside, a degraded castaway, the mere refuse of his sated passion, the unhappy mother of a bastard child. This gives us pause indeed.

But it is said that hard cases make bad law; and we must accordingly be careful that any moral reprobation this contention may provoke does not blind us to the facts or to the law.

Was there then, in point of fact, any such condition as was argued to exist? Was there, to use the language of the fourth paragraph of the petition, any such *express* condition? I am of opinion that there was not. There was, in my opinion, no such stipulation, either express or implied. I think the substance, the essence, of the marriage, was constituted by the affirmative answers given to the questions of the priest; by the mutual consent elicited by these questions. I think the Latin word *vis* is equivalent to "Are you willing? Do you consent?" and the word *volo*, to the words "I am, I do"; and that all the rest of the formula is merely declaratory, confirmatory, symbolical, and ceremonial. If this be so, as I think it is, there was an absolute unconditional contract of marriage; and this view is, I think, borne out by the "Roman Ritual," which consists merely of the affirmative answers given to the priest.

The questions and answers in the "Roman Ritual" (1) are in language identical with the language of the questions and answers put and received in this case. But, assuming this view, though supported by the opinion of many eminent canonists, not to be the true view, and assuming that the substance, the essence, of the marriage is to be found later on in the formula used, I think the *verba de præsenti*, words in the present tense, used according to the directions given in the Prayer Book, "I take thee to my wedded wife," &c., and "I take thee to my wedded husband," &c., used respectively by the contracting parties, would be a sufficient expression of their mutual consent to constitute a marriage. This seems to have been the opinion of that most distinguished Judge, Sir James Willes (see his great judgment in *Beamish* v. *Beamish* (2)). I say, however, with supreme respect and deference, it would have been more satisfactory to me if I had found in that judgment some special reference to the *Rituale Romanum*, and to the omission from it of the *accipio* clause.

But whatever opinion may prevail (and I most studiously, most emphatically, disclaim even the appearance of dogmatism) as to where the essential words lay in the formula before us, I think there was cumulative evidence of mutual consent regarding the formula as a whole. It may nevertheless, indeed with some plausibility, be argued, as in fact it was, that what follows the mutual acceptance, the mutual "taking" so to speak, was not essential to the constitution of matrimony, but represented merely the duties and functions attaching to Christian marriage; and that the words, "if Holy Church will it permit," and the troth-plighting had reference merely to the discharge of these duties and functions. The expression *Ego conjungo vos in matrimonium* was not, in my opinion, essential. It was used merely to give a religious character to the ceremony; to indicate that the official witness, the witness who attended on the part of the Church, saw nothing wrong in the ceremony; and the crossing of the right

(1) For form of Roman Ritual, see Irish Ecclesiastical Record, April, 1912, p. 400, in notes, where the *accipio* clause is entirely omitted. See also p. 401.

(2) 9 H. L. C. 274.

K. B. Div. 1912.

USSHER v. USSHER.

Lord O'Brien, L.C.J.

hands, and the blessing and putting on of the ring, and the giving of the marriage gifts, were merely symbolical.

The true view of the facts—the true view as presented by the actual position as it existed at the time of the ceremony—as I ventured to point out during the progress of the argument, was that the petitioner not only consented to be married to the respondent, but was most eager and desirous to be married to her; to have the marriage then and there secretly celebrated by the Rev. Joseph Fahy. He was, as I have said, equally urgent to get married and to have the marriage kept secret; and it is to my mind clear that both the petitioner and the respondent thought that the ceremony was absolutely binding and valid, both in the eye of the Church and the law. The Rev. Joseph Fahy may, perhaps, in his hurry and confusion have confounded the *official* witness, the priest, with the *formal* witness—that is to say, he may have regarded himself as one witness and Agnes Kavanagh, the cook, as another; but most certainly the clandestine method of the celebration of the marriage was much to be regretted.

I think I may here appropriately quote a passage from the judgment of Lord Chelmsford in the case of *Beamish* v. *Beamish* (1) as to the effect of a clandestine marriage. He says at page 357 of the report:—"But where such a contract *per verba de praesenti* was declared in the presence of a person in holy orders present for the purpose of receiving such declaration, there was a complete and valid marriage, although, in consequence of not taking place *in façie ecclesiae*, it was considered as clandestine, and subjected the parties to the censure of the Church. These marriages, however, were regarded by the Ecclesiastical Courts as complete and lawful marriages, and *so they were by the Courts of Common Law*, and as drawing after them all the legal rights and consequences incident to marriage; nor were the parties ever compelled to repeat the ceremony in the face of the Church; all which is clearly explained by Lord Lyndhurst in *Regina* v. *Millis* (2)." This is the language

(1) 9 H. L. C. 274. (2) 10 Cl. & F. 534.

of Lord Chelmsford, and his statement that clandestine marriages were regarded as complete and lawful marriages at Common Law gets rid of all objection on the ground of clandestinity. Indeed, it is the Decree *Tametsi* of the Council of Trent, and the later Decree, *Ne Temere* (neither of which affects in any way the law of the land, the common law), that made clandestine marriages invalid in the eye of the Church.

But to return to the allegation that the marriage was conditional. There certainly was nothing conditional in the questions of the priest, nor in the answers of the petitioner. The answer that the petitioner would marry according to the rite of the Church meant simply that he was willing that the Roman Catholic ceremonial should be adopted; it did not in any way qualify his intention to get married; it simply meant that he was willing that the Roman Catholic ceremonial of marriage should be used—a ceremonial of marriage which was, in my opinion, in no way of a conditional character.

The words "if Holy Church will it permit," were at most no more than this, that the marriage should be regarded as binding and valid if nothing was discovered to exist affecting the personal relations of the contracting parties (such as consanguinity or affinity) to justify their separation in the eye of the Church, and require dissolution of the marriage bond. For my own part I think that these words had no reference to what I have described as an external requirement, the presence of two witnesses, the necessity for whose presence was created by the ordinance of the Council of Trent. Indeed, these words are found in rituals which were in use long before the ordinance of the Council of Trent was promulgated or even existed.

I think, too, that it may be very plausibly argued that these words, which occur after the statement of the obligations and duties of marriage, and in immediate relation to them, at the end of the "*habendum*," so to speak, are but a vague expression of deference to the Church, similar to the analogous expressions "Please God," "if it please God," "with the blessing of God," "God willing." Indeed in our own Courts we constantly hear the phrase "If your Lordship pleases," and in the House of Commons members not unfrequently make use of the formula, "With the

K. B. Div. 1912.

USSHER *v.* USSHER.

Lord O'Brien, L.C.J.

permission of the House." These phrases are accepted as mere expressions of courtesy, and are in no way restrictive of exhaustive argument or elaborate discussion. The mere occasional use of these words (for they are found only in some of the rituals) tends to bear out the view that they are not essential, that they have no special significance, but are, as I have said, a mere vague expression of deference to the Church. They are altogether omitted in some of the rituals. For example, they are not found in the "Roman Ritual," nor in the ritual which is in use in America; and in the old Sarum Ritual other words are employed. Nor are the words found in the York Missal; while in the Hereford Manual and Missal the words are "as Holy Church has so ordained." Such words do not, in my opinion, make the marriage conditional; they do not qualify the absolute character and effect of the mutual consent already given in the presence of the priest. The interchange of consent and the intervention of the priest created in a legal point of view the contract; and from an ecclesiastical point of view conferred the sacrament of marriage. The consent should be freely and deliberately given, without mistake as regards personal identity, without fear, force, or duress, by persons competent to contract, and should be expressed in words or by some sensible sign. All these conditions were fulfilled in the present case.

Though a priest be present, it is, in the language of a distinguished canonist (Devine on the Law of Christian Marriage, p. 57), "the well-settled doctrine of the Roman Catholic Church that the contracting parties are themselves the ministers of the sacrament, and not the officiating priest, who only confirms and blesses the marriage, and can only be called the minister of its solemnity." This ratification and blessing were, I think, intended to be expressed by the phrase *Ego conjungo vos in matrimonium*. The priest, notwithstanding the form, the literal import of the words, does not unite in matrimony; the marriage union is not created by him; he merely expresses approval on the part of the Church of what has already taken place. This expression *Ego conjungo vos in matrimonium* relates to and is conversant with the ceremonial, with what is non-essential, with what is merely ceremonial and symbolical, and not with the essence and substance

of matrimony; the marriage has already taken place by the interchange of mutual consent, *per verba de praesenti*, in the presence, and with the intervention, of the priest, whether in the so-called espousals, the questions put and the answers received by the priest, or in the latter part of the formula of marriage. And the fact that the marriage union has been already effected should be borne in mind when construing the words "if Holy Church will it permit." These words occur after an absolute marriage has taken place, and, in my opinion, do not qualify it.

With reference to the presence of a priest, Lord Wensleydale, in his judgment in *Beamish* v. *Beamish* (1), says:—"The elaborate opinion of the consulted Judges which has been delivered to us by Mr. Justice Willes gives very ample and satisfactory reasons why the presence of a third person, a clergyman, should be required. They suggest that there must be three reasons for requiring his presence. First, that it may be that he is to be a representative of the Church, for the purpose of giving a religious character to the ceremony, and invoking from the Almighty a blessing on the union, for that is the only sense in which a blessing can be given by human lips. Secondly, that he must be present as a trustworthy witness to the contract, to see that the parties to it fully understand each other, that they really mean to contract and take each other from that time for husband and wife, and to bear witness thereafter to others to that fact. Thirdly, that he has a power to prevent the marriage from taking place, if a just impediment is brought to his knowledge, such as consanguinity or affinity within the prohibited degrees."

Here there was no impediment as regards consanguinity or affinity. The parties fully understood each other, and the priest purported to pronounce a blessing. Whatever the conduct of the Rev. Joseph Fahy was, he was present; he saw what was going on, and was, therefore, competent to give evidence of the marriage. And since the ceremony took place nothing has supervened to invalidate the marriage.

But, as to the so-called conditional contract, can it be now successfully contended, after the marriage has been consummated

(1) At p. 350.

K. B. Div. 1912. USSHER v. USSHER. Lord O'Brien, L.C.J.

and a child born, that the condition any longer subsists—subsists for what? To make a concubine of the wife, to show that she has lived in a state of concubinage, and that the child is illegitimate. Such a condition, if it ever existed, was certainly put an end to by the consummation of the marriage and the birth of a child. The petitioner must, under such circumstances, be taken in the eye of the law to have renounced any such condition.

But could such a condition be at all valid and binding? I am careful not to refer to a marriage *per verba de futuro*. There may be, I think, a conditional contract in this way. A man and a woman may contract to be married after the lapse of a certain time on condition that the father of the woman provides at that future time a fortune agreed upon, say, £10,000. If that sum were not produced at the time agreed upon, the contract could not be made even the subject of an action for breach of promise of marriage. But, take the case of a marriage *per verba de praesenti*, which upon the moment not only makes a contract, but confers a new status, and gives an immediate right to cohabitation and consummation; can such a marriage be made subject to defeasance?

But, more especially, can it be subject to defeasance if the right to cohabitation and consummation, as in this case, has been exercised? Such a condition would, in my opinion, be bad for repugnancy, and would be invalid also as opposed to public policy, which favours the unity of the spouses created by marriage as preservative of morality, and also the procreation and up-bringing of children within the marriage bond.

But how did the contract become conditional? I take it that in order that a contract be conditional, the condition must be present to the mind of the maker when the contract is being made. Can it be said that the petitioner knew anything about the words "if Holy Church will it permit" till long after the ceremony had taken place. These words are not referred to in the petition; and it is only some time after the acute professional mind had been brought to consider the matter that any reference was made to them. I think it is quite clear that the petitioner never, consciously at least, made a conditional contract, and that he and the respondent thought that the ceremony constituted then and there

an absolute contract of marriage. Both certainly acted upon that basis.

But let me refer to what I consider supplies an analogy. According to Canon Law, a marriage *ratum et consummatum* is indissoluble. (See Devine on the Law of Christian Marriage, p. 92.) Here, no doubt, in the eye of the Church the ceremony did not amount to *matrimonium ratum*; it was not properly contracted, the essential condition of the presence of two witnesses not having been complied with; but there was a good contract at Common Law *per verba de praesenti* in the presence of a priest, and this was followed by consummation. Certainly, the marriage that was celebrated was attended by the result that there could be no *restitutio in integrum*. The respondent could never again be the thing she was before consummation. And it is not pretended, or in any way suggested, that there was on the part of the respondent any misconduct which would justify divorce—in this country separation *a mensâ et thoro*, or in England divorce *a vinculo matrimonii*.

One remaining topic. At the time the Report on the Marriage Laws was made, the 19th Geo. 2, c. 13 (Ir.), was still in existence, and rendered, as we know, the marriage by a priest of two Protestants, or of two persons, one of whom had been or had professed himself or herself to be a Protestant at any time within twelve months of the alleged marriage, null and void; but this Act was repealed many years before the marriage with which we are now concerned took place by the 33 & 34 Vict. c. 110, and the repealing Act left Roman Catholics subject to no statutory disability as to a contract of marriage between themselves. It will be remembered, as I pointed out in the earlier part of my judgment, that the petition in this case was presented on the hypothesis that both petitioner and respondent were Roman Catholics. (See par. 1 of the petition and par. 2 of the petitioner's affidavit, where it is alleged that both petitioner and respondent were Roman Catholics at the time of the ceremony of marriage.) And the last section (s. 42) of 33 & 34 Vict. c. 110, which provides that that statute and the 7 & 8 Vict. c. 81, should be read together and construed as one Act, removes all the difficulty which was alleged to attach to the third section of the 7 & 8 Vict. c. 81, because, there being no

K. B. Div. 1912.

USSHER v. USSHER.

Lord O'Brien, L.C.J.

limitation of time as to the profession of Protestantism existing at the moment when the marriage took place, the petitioner and respondent were then free to contract as Roman Catholics; and, therefore, "a marriage could lawfully be celebrated between them."

I am, accordingly, of opinion that the marriage which took place between the petitioner and the respondent was a valid marriage according to the law of the land, according to the Common Law, and that the petition should be dismissed with costs.

It will be seen that I have dealt with the case irrespectively of the form of the verdict. It was (I think somewhat erroneously) styled a "special verdict." I have dealt with the issue formally knit for our decision by my brother Madden, who presides in the Probate and Matrimonial branch of this Division. I have dealt with the case with reference to the established facts, whether in relation to Church law or the Common Law, upon the basis upon which my brother Kenny, with the consent of all parties, dealt with the case, and, indeed, upon which the case was presented and argued here.

PALLES, C.B.:—

The parties to the marriage the validity of which is in question were both Roman Catholics; the ceremony was performed by a Roman Catholic Priest; and the rite was in all respects in accordance with that prescribed by due ecclesiastical authority of the Roman Catholic Church, with one exception: there was but one witness present with the Priest, instead of the two witnesses required by the Council of Trent (1) and the decree "Ne Temere" (2).. These decrees, having been made after the Reformation, admittedly never became part of the Common Law of this country. The decree of the Council of Trent, however, upon its extension to the whole of Ireland, in January, 1828, and the subsequent decree, upon its coming into force in 1908, became, and since have been, part of the law of the Roman Catholic Church in Ireland.

(1) Sess. xxiv, c. 1, de Reform. (2) III. Matr.

For reasons which I shall mention later on, I assume it to have been proved or admitted at the trial that the absence of the second witness rendered the marriage null, according to the law of the Roman Catholic Church. The petitioner insists that, because it is void according to that law, it follows that it is also void according to the law of Ireland; and he also contends that two witnesses are, according to the law of Ireland, necessary to the validity of a marriage of two Roman Catholics by a Roman Catholic Priest. In support of these contentions, he puts forward the four following propositions:—

1. That, by the express words of the Roman Catholic Ritual—the Ritual used in the ceremony: "I, N., take thee, N., to my wedded wife, to have and to hold . . . *if holy Church will it permit*," (1), the contract was made conditional upon the marriage being in accordance with the law of the Roman Catholic Church; and that, as that condition was not satisfied, there was not any absolute contract of marriage.

2. That, even were the contract of marriage not in terms conditional, yet the only marriage which was contemplated, according to the intention of the parties, was one valid according to the law of the Roman Catholic Church—one which, according to the law of that Church, would be a Sacrament; and that as this intention wholly failed, there was no contract whatsoever.

3. That, according to the statute law now in force in Ireland, a marriage between two Roman Catholics is void unless it is celebrated in the presence of two witnesses in addition to the Priest; and

4. That, if the last preceding proposition is not true generally, it is true in reference to a marriage such as the present, one of the parties to which was a professing Protestant within the immediately preceding twelve months.

We are called on therefore to determine whether any or all of these propositions are correct.

I take, now, the first question—whether the contract entered

(1) Ordo Admin. Sacr.: Dublin. 6th ed.

K. B. Div. 1912.

USSHER v. USSHER.

Palles, C.B.

into between the petitioner and the respondent during the ceremony of the 24th April, 1910, was an absolute one of present marriage, not dependent upon any permission or expression of permission by the Roman Catholic Church, other than such permission as was involved in the ceremony itself?

Proceeding, then, to construe this contract, I have to observe that the House of Lords in *Beamish* v. *Beamish* (1) referred to and took judicial notice of the pre-Reformation Constitutions, Manuals, and Sacramentaries of certain of the English Ecclesiastical Dioceses. The House was there sitting on appeal from a Common Law Court. *A fortiori*, therefore, this Court, sitting as the successor of the former Court Christian, in a cause within its peculiar jurisdiction, is also entitled to make such reference and take such judicial notice.

The use of these Sacramentaries was permitted, indeed enjoined, in Ireland, by the Synod of Cashel, in 1172. Its words in cap. viii, are, "Quod omnia divina ad instar sacrosanctae ecclesiae juxta quod Anglicana observat ecclesia in omnibus partibus ecclesiae amodo tractentur. Dignum enim et justissimum est, ut sicut Dominum regem ex Anglia sortita est divinitus Hibernia, sic etiam exinde vivendi formam accipiat meliorem." (2)

Having these Sacramentaries before me, I at once find that the Ritual used at this ceremony, which is one bearing the *Imprimatur* of His Eminence Cardinal Logue, "Archbishop of Armagh, Primate of all Ireland," and of the "Archbishop of Dublin, Primate of Ireland" (3), had its origin in one of the ancient Rituals of the pre-Reformation Church, *i.e.*, that of Sarum; and I am of opinion that that ancient Ritual, with other English pre-Reformation Rituals, may be referred to for assistance, in ascertaining the meaning of the words used in the contract we are examining.

The marriage service, according to the Sarum Use, is to be found in Palmer's "Origines Liturgicae" (4), and more fully in Maskell's "Monumenta Ritualia Ecclesiae Anglicanae." (5)

(1) 9 H. L. C. 274.

(2) Harduin: Concilia, tom. 6, c. 1630, edit. Paris, 1714.

(3) Ordo Administrandi Sacramenta, 6th ed., Dublin. (Duffy & Co.)

(4) Vol. ii, p. 212, 2nd ed., Oxford, 1836.

(5) Vol. i, p. 42. London, 1846.

In this Sarum Use, the bridegroom is first interrogated by the Priest, "in lingua materna, sic:

"N., Vis habere hanc mulierem in sponsam, et eam diligere, honorare, tenere, et custodire sanam et infirmam, sicut sponsus debet sponsam, et omnes alias propter eam dimittere, et illi soli adhærere, quamdiu vita utriusque vestrum duraverit?

"Respondeat vir: Volo."

Then the Priest says to the woman, "hoc modo:

"N., Vis habere hunc virum in sponsum, et ei obedire et servire; et eum diligere, honorare, ac custodire, sanum et infirmum, sicut sponsa debet sponsum; et omnes alios propter eum dimittere, et illi soli adhærere, quamdiu vita utriusque vestrum duraverit?

"Respondeat mulier: Volo."

I pause here for a moment, to observe that the above words appear to have the same force as "Ego accipio te, N., in meam," and "Ego accipio te, N., in meum"—words as to which we find the two earliest English Ecclesiastical Constitutions now extant, viz., that of Richard de Marisco (1), Bishop of Durham in 1217, and that of Richard Poere (2), Bishop of Salisbury about the same time, teach: "Item praecipimus quod sacerdotes praecipiant et doceant personas contrahentes hanc formam verborum in Gallico vel Anglico. . . . In his enim verbis consistit vis magna, et matrimonium contrahitur."

After the questions and answers I have read from the Sarum Ritual, which are thus declared sufficient to constitute matrimony, that Ritual proceeds to direct that the bride's father or friend shall deliver her to the bridegroom; and that the bridegroom shall repeat after the Priest: "I, N., take thee, N., to my wedded wyf, to have and to holde fro this day forwarde for better for wors; for richere for poorer; in sykenesse and in hele, tyll dethe us departe, *if holy chyrche it wol ordeyne*; and thereto I plight the my trouthe."

The Ritual then directs that the woman shall repeat after the Priest words slightly different, but substantially of the same import, concluding, as do those of the husband, with the words

(1) Wilkins: Concilia, tom. 1, p. 582.

(2) Martene: de Antiquis Ecclesiae Ritibus, vol. ii, c. 9, Art. 2.

K. B. Div. 1912. USSHER v. USSHER. Palles, C.B.

"tyll dethe us departe, if holy chyrche it wol ordeyne, and thereto I plight thee my trouthe." It is in this second part only of the service, which is called the *traditio uxoris*, that the words "if holy chyrche it wol ordeyne" occur; and there is an important Rubric in reference to it which is given at page 42 of the same volume, and is in these words:—"Et sciendum est quod licet omni tempore possint contrahi sponsalia, et etiam matrimonium quod fit privatim solo consensu, tamen *traditio uxorum* et nuptiarum solemnitas *certis temporibus fieri prohibentur*"; and then it proceeds to specify certain times, called *ecclesiastically*, I believe, "close times," one of which is from Advent to the Octave of the Epiphany, and another from Septuagesima Sunday to the Octave of Easter, during which the *traditio uxorum* is to be omitted. Maskell, in a note on the same page, gives us to understand that a similar Rubric is to be found in the York Manual.

Two other pre-Reformation Rituals must also be referred to, the Hereford and the York. The Hereford Use (1) substitutes words in the past tense for those which in the Sarum we have in the future, with the further necessary grammatical alteration of "as" for "if." Thus, instead of "if holy chyrche it wol ordeyne," it has "as holy chyrche hath ordeyned." The York Use (2) omits the words altogether.

Now, these three authorized Forms of Ritual for the full and complete administration of the Sacrament of Matrimony—the Sarum Form, the Hereford Form, and the York Form—are, notwithstanding their apparent differences, Forms for the administration of the same Sacrament of the same Church; and, furthermore, the Sacrament, according to the settled doctrine of the Roman Catholic Church, is the contract. Therefore the differences between the Forms—the presence or the absence of words showing the necessity of the permission of the Church, or indicating the time at which that permission is to be given—*i.e.*, whether before or after the *traditio uxoris*—must be non-essential, and cannot affect the contract and the Sacrament. In my clear opinion, either of the two facts I have mentioned—

(1) Maskell's Ancient Liturgy, lxxxi. (2) *Ibid.* lxxx.

viz., (1) the omission of the words in the York rite, whilst they appear in the Sarum rite; and (2) the omission of the *traditio uxoris* in certain ecclesiastical times—would be alone conclusive to show that, whatever be the meaning of the words in question, they cannot amount to a condition. The contract in each must in essence be the same, and must be the contract identical with the Sacrament, that is, a present agreement by bride and bridegroom mutually to take each other, *hic et nunc*, as husband and wife. It is absolutely beyond reason to hold that the unconditional or conditional nature of a contract of marriage—a contract always recognised as the most solemn capable of being entered into—a contract which, by the usage of Christian society was, and is, treated as having been completed, and as having effected the intended change of status, at latest when the religious ceremony is ended—should in pre-Reformation times have depended upon whether its solemnisation was in York or in Salisbury, and, if in the latter, upon the particular period of the ecclesiastical year in which the solemnisation took place.

For these reasons, I am satisfied that the words in the Sarum Ritual, "if holy chyrche it wol ordeyne," are identical in meaning with those of the Hereford rite, "as holy chyrche hath ordeyned"; and that, whatever may be their meaning, neither the one nor the other of them imported a condition—especially a condition which would be repugnant to the contract of present marriage. It may not be easy now, after the lapse of so many centuries, to say what is the exact meaning of these ancient words; but I desire to emphasise the fact that it is absolutely immaterial to the decision of the present case what that exact meaning is. Once we hold that they do not create a condition, their exact meaning, or their origin in the course of the evolution of the English Christian service from the non-Christian marriage services of Rome or England, ceases to have any bearing upon the present issue. I may express, however, my individual opinion that the words of the Hereford rite, "as holy chyrche hath ordeyned," refer to and emphasise the fact that the marriage has been ecclesiastically solemnised by the Church, through the Church's minister, the officiating Priest; and that, if this be the true meaning of the words in the Hereford Use, such, too, must be the meaning of the corresponding words in that of Sarum. This

K. B. Div. 1912.

USSHER v. USSHER.

Palles, C.B.

construction of them also accounts for their absence from the York Form; because, viewed in this light, they did no more than state a fact which, without any statement of it, was apparent from the ceremony being an ecclesiastical one. And if it be asked how the conditional "if" came to be introduced, I have but to mention the well-known fact that formerly instead of one ceremony there were frequently, indeed usually, two—the sponsalia and the actual marriage, which were celebrated at different times; and that, when the custom of a single ceremony became general, its ritual was compounded from those of the two earlier separate functions. The "if" would have been grammatically proper in the former of the two.

I now come to the words of the Irish Ritual. To understand the contract contained in it, we are at liberty to refer to the decree of the Council of Trent prescribing the rite. It is the decree made in Session xxiv.: "Decretum de Reformatione Matrimonii." Caput I of that decree contains these words:—"Si nullum legitimum opponatur impedimentum, ad celebrationem matrimonii in facie ecclesiae procedatur; *ubi parochus, viro et muliere interrogatis, et eorum mutuo consensu intellecto*, vel dicat: 'Ego vos in matrimonium conjungo, in nomine Patris, et Filii, et Spiritus Sancti'; vel aliis utatur verbis juxta receptum uniuscujusque provinciae ritum."

These words recognise as the essence of matrimony (that which our Common Law recognised, with the proviso that they were expressed in the presence of and with the assent of a Priest), the mutual consent of the spouses externally expressed, *i.e.*, expressed by words or other signs: "*mutuo consensu intellecto.*" The words of blessing directed to be used by the parochus are not essential; the decree declares that other words, "juxta receptum uniuscujusque provinciae ritum," may be substituted for them; and further, the Common Law and the Canon Law agree in holding that they are not essential; that their effect is that of a blessing only. But as to the essence of the marriage—the contract, the mutual consent of the spouses—the decree directs that it shall be elicited by questions of the parochus, "viro et muliere interrogatis." And the modern decree "Ne Temere" repeats and emphasises the direction (1).

(1) iv. s. 3

The Irish Ritual formed in accordance with these decrees contains these words:—

"Sacerdos Matrimonium celebraturus . . . si nullum obstet legitimum impedimentum . . . virum et mulierum . . . de consensu in matrimonium singillatim interroget, vulgari sermone, in hunc modum:

"Ac primo sponsum: 'N., *Wilt* thou take N., here present, for thy lawful wife, according to the rite of Our Holy Mother the Church?'

"Respondeat Sponsus: '*I will.*'

"Deinde Sacerdos sponsam interroget: 'N., *Wilt* thou take N., here present, for thy lawful husband, according to the rite of Our Holy Mother the Church?'

"R.: '*I will.*'"

Having regard to the words of the Trent decree: "viro et muliere interrogatis et eorum mutuo consensu intellecto," and to those of the "Ne Temere": "requirant (Parochus et loci Ordinarius) excipiantque contrahentium consensum," I read these words, "I will," not as words *de futuro*, or as "I shall," but according to their strict grammatical meaning, as the equivalent of the Latin, "volo," signifying a present consent mutually to become, here and now, husband and wife. These words, had the ceremony ended there, would have been equivalent to those of the ancient Sarum rite as used in "close times," and would have constituted marriage. I do not say that they might not, possibly, be controlled or affected by subsequent words. I hold that we cannot reject any part of the service in determining the contract; but, when the service commences with these words, sufficient, if not controlled by subsequent expressions, to constitute absolute and present marriage, it requires a coercive context to qualify or control them. Then follows in the Irish Ritual, as in the ancient Rituals, the *traditio*, in which the words alleged to constitute a condition occur. But in those ancient Rituals the *traditio* was not part of the essence of the contract, because, as I have shown, it was forbidden to be used at certain periods of the ecclesiastical year; and, therefore, whatever be the meaning of the words, they cannot qualify the former absolute words used in answer to the questions, nor consequently the *verba de praesenti* of the previous part of the

K. B. Div. 1912. USSHER *v.* USSHER. Palles, C.B.

rite. Although I have formed an opinion as to the particular part of the ceremony at which the sacrament is conferred, I think it unnecessary to express whether it is by the use of the words "I will," in answer to the questions of the Priest, or by the *traditio*, as I do not desire to enter upon unnecessary questions. My own view is that either of the clauses is sufficient for that purpose, and that the object of continuing the cumulative repetition of the *verba de praesenti* when combining the ceremonies of betrothal and of marriage may have been to guard against possible omission.

In my opinion the words in the present Ritual, "if Holy Church will it permit," are not words of condition; and I feel bound to add that, if they were to be so read, introducing as they would the post-Reformation decrees of the Roman Catholic Church, the condition would not only be repugnant to the contract of present marriage, but further, as it would import into the contract all the impediments of the Roman Catholic Church, which are more extensive than those which are acknowledged by the law of the realm, it would be illegal; and, as well on the ground of its illegality as of its repugnancy, it would be inoperative, and the contract would be absolute. These words are, in my opinion, of the same nature as those in the Sarum and Hereford Rituals. They imply, and are intended to elicit, a statement of the fact otherwise apparent, that the marriage is entered into with the consent of the Church. They appeal for the approval of the Church; and, according to my reading of the Ritual, this appeal is, on the moment, answered in the affirmative by the Church, which, by the voice of its authorised representative, the Priest, in the words, "*Ego conjungo vos in matrimonium*," adopts, as its own, the act by which the contracting parties have just joined themselves in matrimony; and thereby permits, ratifies, and approves of it. They record that consenting presence of the priest, which the House of Lords, in *Beamish* v. *Beamish* (1), held to be essential to the validity of a marriage in Ireland; but what they so record is so apparent from the other words of the service that I regard them as being merely ceremonial.

(1) 9 H. L. C. 274.

I do not, of course, intend, by anything I have said, to deny that, according to Canon Law, there may be a contract of marriage dependent upon the happening of a future contingent event; but I distinguish such a case from the present in two respects—first, our decision here must be based, not on the Canon Law, but on the Law of the Realm (as to which hereafter); and, secondly, in such a conditional marriage, the Sacrament is not conferred until the occurrence of the contingency; while the authorised rite here—indeed, all authorised Rituals that I have seen—contemplate the *present* administration of the Sacrament, and consequently involve an absolute and not a conditional contract. The final prayer in the Irish Catholic Ritual describes the parties as already joined in matrimony, "*famulos tuos . . . qui te auctore junguntur.*"

I am confirmed in the view which I take of the words of the Ritual, by the admitted attitude of the Roman Catholic Church towards conditional marriage. She allows no such marriage, unless under most exceptional circumstances. She holds that the Sacrament is conferred only when the condition has been fulfilled; and she teaches that, until then, marital intercourse between the contracting parties is sinful and forbidden. The rite for such a conditional marriage would be a very special one. There is no authorised Ritual Form applicable to it. How, then, could she attach to the contract contained in the ordinary authorised form of the administration of the Sacrament, a meaning which would render every marriage in which it was employed conditional, and give no instruction, speak no word of warning, to those who ordinarily use her Ritual?

And, finally, the Catholic Church, by her classification of matrimonial impediments—some *diriment*, others merely *prohibitive*—and by her acceptance of some marriages (viz., those contracted notwithstanding a prohibitive impediment) as valid, which she does not *permit*, shows us very clearly that the validity of Catholic marriages cannot be conditioned by the clause, "if Holy Church will it *permit*."

Upon this first question I have no more to add than this, that I am unable even to adopt the construction that these words: "if Holy Church will it permit," would operate to avoid a marriage,

K. B. Div. 1912.

USSHER v. USSHER.

Palles, C.B.

were one of the parties not competent to contract marriage because of a diriment impediment, either Divine or Ecclesiastical —say were he or she already married, or were the bridegroom a Priest of the Roman Catholic Church. In such a case there would be no contract, even were the words omitted; and as in construing a contract the existence of the contract to be construed must be assumed, no words in it are to be taken as avoiding it, when independently of such words there is no contract in existence to avoid, as the parties are incapable of entering into it.

Nor, for the like reason, would they be operative to avoid a contract by reason of the absence of the necessary witnesses; as, in such a case also, there would have been no contract, the decree of the Council of Trent declaring that, in such a case, the parties are incapable of contracting matrimony.

As to those observations of mine which refer to the Canon Law, with reference to a conditional contract of marriage, I have to observe that we are conclusively bound, by *Beamish* v. *Beamish* (1), to hold that, at Common Law, not alone is the presence of a Priest at a marriage essential to its validity, but that the Priest must, at the time, assent to the marriage—that is, to all that is necessary then and there to constitute the relation of husband and wife between the parties. Having regard to this, and to the reasoning of Tindal, C.J., and the opinion of Lord Cottenham, in the *Queen* v. *Millis* (2), and to the monumental opinion of Willes, J., in *Beamish* v. *Beamish* (1), I feel bound to say that I entertain considerable doubt whether, according to our Common Law, there can be a conditional marriage at all.

Upon the first question, therefore, I am of opinion that the contract was absolute, and not conditional.

The second contention of the petitioner is that the parties contemplated a ceremony which should be valid according to the law of the Roman Catholic Church; and that, as the ceremony performed was not valid according to that law, there was no contract of marriage whatsoever.

(1) 9 H. L. C. 274. (2) 10 Cl. & F. 534.

In the argument of this question there has been much rather loose reasoning. In it, "contract" has been used in two senses.

Prior to the ceremony, there was, I assume, a contract to marry at some future time, according to the Roman Catholic rite. But that contract is not the contract which is material here. This is not an action for breach of promise of marriage. The only contract we have to consider is that which is involved in the ceremony itself. By this contract the spouses took each other for husband and wife. This they did freely, knowingly, in terms unconditionally, and with the intention of thereby becoming husband and wife. This is the contract. Why is it alleged that this contract is not binding?

Not because it was not made: it is admitted it was made; but because it was made under mistake; as the spouses believed such contract to constitute a valid marriage according to the law of the Roman Catholic Church. They wished, it is said, to enter into a marriage which should be not merely a valid civil contract, but a Sacrament of the Roman Catholic Church as well; and it has been argued that their consent to the civil contract was therefore conditioned by its being a Sacramental contract also; which, admittedly, it was not.

Now I assume that it was the intention of one, at least, of the parties to receive a Sacrament of the Roman Catholic Church; and that, had she known that this intention was bound to fail—as it did fail—because of non-compliance with that Church's law, she would most probably not have entered into the civil contract.

But it does not follow that her consent, any more than that of Mr. Ussher, was conditional on the marriage being Sacramental. No such condition was expressed by anyone during the ceremony; there is no suggestion that such a condition was present to the mind of anyone at the ceremony; and an intention, which neither of the contracting parties had, but which under other circumstances, or with other knowledge, they might, or even probably would, have had, cannot be held to avoid the contract. Many marriage contracts would fail were such a principle to be admitted. Were every husband and wife, who had made a grave mistake in contracting marriage, and who with clearer knowledge

K. B. Div. 1912.

USSHER v. USSHER.

Palles, C.B.

would have refused to contract at all, to be free to repudiate the contract, how many current marriages could be declared legally binding? I make no doubt that there can be a mistake which will avoid the legal contract. But such a mistake must affect the very substance of the legal contract itself—for instance, the personal identity of one or other of the contracting parties. It must not be concerned with something merely accidental to the person—as, for instance, his or her wealth, position, or religion; or wholly separable from the contract—such, for instance, as in the present case, its effect.

Besides, it has not been suggested that Mr. and Mrs. Ussher had any different intention, when going through the ceremony, from that which other Roman Catholics have universally on like occasions; and a conditional marriage is practically unheard of among Roman Catholics.

Finally, we have it in evidence that Mr. and Mrs. Ussher at once entered on their married life, and continued in it, without any misgivings, and without enquiry into the fulfilment or non-fulfilment of any condition whatsoever—clear proof that they themselves had intended their marriage to be absolute, and not conditional. Indeed, I have no doubt that, until the question was raised by the able counsel engaged in this case, neither Mr. nor Mrs. Ussher, had ever heard, or had even conceived it possible, that there could be a conditional marriage.

Hence, too, I cannot admit the argument based on the principle of "predominant intention," which was advanced so subtly by counsel for the petitioner. He represented Mr. and Mrs. Ussher to us as saying: "We wish to enter into a contract and to receive a Sacrament; but, if we are not to receive a Sacrament, we wish not to enter into the contract"; and he spoke of this latter wish as predominant—as prevailing against the former, or rather part of the former, intention. On this I need only remark that the theory of "predominant intention," in so far as it may be thought applicable to the present case, is only another form of the argument of conditional contractual consent; and it is, therefore, open to all the objections by which I have already shown that the marriage consent of Mr. and Mrs. Ussher was not intended by them to be conditional; nor,

in such a contract, could unexpressed intention, even if it existed, be allowed to prevail against the intention which was expressed.

Even, therefore, were marriage no more than a contract, I should still not admit the argument of the petitioner. I might, indeed, allow that, in such a case, a Court of Equity *might* entertain an application *to rescind* the contract, on the ground of mistake, were it not that there could not be a *restitutio in integrum*. But such an application, even had the marriage not been consummated, would have for its basis the capacity of the parties to rescind by joint consent; and the Court would do no more than compel one of them to do what he or she had already the power of doing without the intervention of the Court.

But marriage is something more than a contract. It confers a *status*, through which unborn children obtain a title; and it is not revocable by the consent of even both parties. Hence the jurisdiction of our Courts of Justice to rescind contracts is not applicable to the contract of marriage. They can, of course, carefully examine into any circumstances which show that there was *no contract*, such as absence of *any* contractual intention, or such undue influence as shows that there was not a consenting mind, or substantive mistake as to the person. But, once there is a contract, freely and knowingly made, neither fraud nor mistake is sufficient to avoid it.

This law is absolutely settled. The cases in which questions as to it arise are more usually those of fraud than of innocent mistake; but if mistake, induced by the gross fraud of one of the parties, is insufficient to procure avoidance at the suit of the defrauded party, innocent mistake must, *a fortiori*, be also insufficient.

As to this, I shall mention but two cases, *Swift* v. *Kelly* (1), and *Moss* v. *Moss* (2).

In the judgment of the Privy Council, in the first of these cases, it is stated to be certainly the law of England that, unless there be some positive statute law requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it has been contracted upon false representations,

(1) 3 Knapp, 257, at p. 293. (2) [1897] P. 263, at p. 267.

K. B. Div. 1912.

USSHER v. USSHER.

Palles, C.B

and that, but for such contrivances, consent never would have been obtained. "Unless the party imposed upon has been deceived *as to the person*, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made."

In the second of these cases, *Moss* v. *Moss* (1), the late Sir Francis Jeune states the law in these terms:—

"While habitually speaking of marriage as a contract, English lawyers have never been misled by an imperfect analogy into regarding it as a *mere contract*, or into investing it with all the qualities and conditions of ordinary civil contracts. They have expressed their sense of its *distinctive character* in different language, but always to the same effect. Lord Stowell said that it was both a civil contract and a religious vow: *Turner* v. *Meyers* (2), referring, no doubt, mainly to the *incapacity of the contracting parties to dissolve it*. Dr. Lushington spoke of it as *more* than a civil contract: *Miles* v. *Chilton* (3). Lord Hannen said:—'Very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is, indeed, based upon the contract of the parties, but *it is a status* arising out of a contract': *Sottomayer* v. *De Barros* (4). The late President, Sir Charles Butt, said, in the case of *Andrews* v. *Ross* (5), that 'the principles prevailing in regard to contract of marriage differ from those prevailing in all other contracts known to the law.'"

For these reasons, I am of opinion that the second proposition of the appellant is not sustainable.

The third contention of Petitioner's counsel is that, according to the statute law at present in force in Ireland, a marriage between two Roman Catholics is void, unless it is celebrated in the presence of two witnesses, in addition to the priest; and their fourth is that, if this proposition is not true generally, it is true in reference to a marriage such as the present, in which one of the parties was a professing Protestant within the immediately preceding twelve months.

(1) [1897] P. 263 at p. 267.
(2) 1 Hagg. Cons. Cas. 414.
(3) 1 Rob. 684, 694.
(4) 5 P. D. 94, 101.
(5) 14 P. D. 15.

These two propositions may be conveniently taken together. It is quite clear, and, indeed, I understand it to be admitted, that the Common Law never required the presence of any "witness" other than the "official" witness, the Priest. But if conclusive proof of this be required, it will be found in *Beamish* v. *Beamish* (1), a case in which there was no witness present at the marriage, except the clergyman in holy orders, who was the bridegroom. In the elaborate arguments and judgments in the Exchequer Chamber here, in the arguments of counsel in the House of Lords, in the erudite opinions of the Judges, and in the speeches of the Lords who took part in the decision, no objection was raised as to its validity, grounded on the absence of witnesses. Thus, the questions on this branch of the case are based upon the statute law. Now, although I shall not shrink from considering those questions as if we had not the advantage of the Report of the distinguished body of jurists which has been referred to at such length during the argument, it seems to me impossible that we can refuse to receive that Report as an authority—I do not say as a conclusive authority, but as an authority entitled to the utmost deference and respect. It contains a unanimous opinion as to the then existing law on the subject, given after due consideration, in discharge of the duty arising from their having accepted, at the request of the Sovereign, the office of ascertaining the law in reference to marriage, with a view to their Report being made the basis by Parliament of future legislation. Of whom does that Report contain the opinion? Of, *inter alios*, the then Lord Chancellor, Lord Cairns; of his immediate predecessor as Chancellor, Lord Chelmsford; of his two immediate successors as Chancellors, Lord Hatherley and Lord Selborne; of a future Lord Chancellor of Ireland, Lord O'Hagan; and of the then Judge of the Court of Probate in England, the late Lord Penzance, than whom there was no Judge more familiar with and skilled in all questions relating to marriage. Why, were the document no more than a text-book, written by any one of those six distinguished jurists, acted upon (as it has been) for upwards of forty years as containing an accurate statement of the law, it would have been an authority of much weight.

(1) 9 H. L. C. 274.

K. B. Div. 1912.

USSHER v. USSHER.

Palles, C.B.

The part of this Report which deals with marriages between Roman Catholics in Ireland (commencing at page 13) contains three paragraphs vital in this case. The first negatives the existence of any previous statutable enactment varying the Common Law, in respect of the constitution of a legal marriage between Roman Catholics. The second states the Common Law on the subject; and the third contrasts that law with the law of the Roman Catholic Church.

The first paragraph is in these words:—

"Until the year 1863, marriages between two Roman Catholics (being the great majority of the whole number of marriages annually solemnised in Ireland) were left to the operation of the Common Law, without any statutory enactment; and, so far as relates to the *legal constitution* of marriage between such parties, this is still the case; the provisions of the Act passed in that year (26 & 27 Vict. c. 90) being directory, with a view to the registration only of such marriages."

The next paragraph states:—

"By the Common Law (as determined by the House of Lords in the celebrated case of *The Queen* v. *Millis* (1)), the presence of a clergyman in holy orders, either of the Roman Catholic or of a Protestant Episcopal Church, was essential to the valid constitution of the contract of marriage; but a marriage solemnised by any such clergyman, whether publicly or privately, at whatever time or place, and in whatever form or manner (between parties competent to intermarry) was valid, without any previous publication of banns, licence, notice, residence, or consent; and this is still the law of Ireland as to all Roman Catholic marriages."

The Report having thus stated the law of Ireland at that date as to marriages between Catholics in Ireland, proceeds to state the law of the Catholic Church under the decree of the Council of Trent, and to contrast it with the law of Ireland as previously stated:—

"By the law of the Roman Catholic Church, under the

(1) 10 Cl. & F. 534.

decrees of the Council of Trent (which are now received throughout Ireland), the presence of the bishop of the diocese, or priest of the parish (or of some other priest deputed by the priest of the parish), is made indispensable for the solemnisation of a marriage recognised as valid *by that law*; and every Roman Catholic marriage ought (though not under pain of nullity) to be preceded by the publication of banns for three Sundays, unless dispensed with (as in Ireland it usually is) by episcopal licence. Of these matters, however (being requisites of marriage by the internal economy only of the Roman Catholic Church), *the law of the land takes no cognisance*; *and a marriage contracted in the presence of any Roman Catholic priest in Ireland, between two Roman Catholics, although contrary to the law and discipline of their own Church, would be legally valid.*"

The statutes which, Mr. Henry insists, necessitate the presence of two witnesses to marriages between Roman Catholics celebrated by a Priest, were not overlooked by the Commissioners. They are the 7 & 8 Vict. c. 81, and the 26 & 27 Vict. c. 90, each of which is referred to, and commented on, by the Report.

The latter Act is no more than a registration one. Its 27th sect. provides that nothing in it shall affect the law of marriage in Ireland. Thus, this argument of the petitioner must rest solely on the 7 & 8 Vict. c. 81.

The third section, however, of this Act enacts "that nothing in this Act contained shall affect any marriages by any Roman Catholic priest which may *now be lawfully celebrated.*"

Mr. Henry argues that the words "lawfully celebrated" in this section mean lawfully celebrated according to the Canon Law. In my opinion, this is an absolutely impossible construction. In our Imperial statutes, "lawfully celebrated" means *prima facie* "lawfully celebrated according to the law of the realm"; and the necessity of limiting, by some such words as "lawfully celebrated," marriages *de facto* celebrated by Roman Catholic clergymen, is apparent from the 19 Geo. II, c. 13 (Irish), by which marriages celebrated by Roman Catholic Priests, to which two Protestants, or one Roman Catholic and a Protestant, or a person who had been a professing Protestant within the immediately preceding twelve months, were parties, were declared void. Thus, adopting the

K. B. Div. 1912.

USSHER v. USSHER.

Palles, C.B.

prima facie meaning of the clause, every word has effective operation. It would require an absolutely coercive context to convince me that our Legislature could permit the validity of a marriage between its own subjects, celebrated in its own dominions, to depend upon a foreign law of which it had no official knowledge. I therefore reject Mr. Henry's construction, and hold that the words "lawfully celebrated" mean "celebrated according to the law of this realm."

Mr. Henry's last contention arises on the word "now." He says that the effect of the section is to except from the operation of the Act only such marriages *as could, at its passing*, be lawfully celebrated by Roman Catholic clergymen; and that although the provision in question of the 19 Geo. II, c. 13 (Ir.), is repealed by 33 & 34 Vict. c. 110, s. 39, the use of the word "now" fixes for ever the class of marriages which are excluded from the operation of 7 & 8 Vict. c. 81, as those which might *then* be lawfully celebrated by Roman Catholic clergymen. Such a construction appears to me to be in direct violation of the rule of construction that a repealed statute is, in the construction of other statutes, to be treated—unless there is strong reason to the contrary—as if it never existed. In my opinion "now," in sect. 3 of 7 & 8 Vict. c. 81, must, since the 33 & 34 Vict. c. 110, be construed as if the 19 Geo. II, c. 13 (Ir.), had never been passed. For this reason, this last contention, in my opinion, fails also.

I have now to add but one word as to the reason why, throughout my judgment, I have assumed that it had been proved or admitted at the trial that the marriage in question was absolutely void, according to the law of the Roman Catholic Church.

The learned Judge at the trial took a special verdict; but such verdict has not been made up by the parties or brought to the learned Judge for signature. In such a verdict, all the material facts proved at the trial, whether they were in dispute or not, should have been found; and the evidence upon which those findings were arrived at should not have come before us; nor, if it did, should we have any right to refer to it. I think, therefore, that there should have been, in the findings, a clear concrete statement of the law of the Roman Catholic Church, as to the effect on the marriage in question of the absence of a second witness, and a

statement as to whether or not, according to that law, the marriage in question was null and void, in the sense in which those words are known to our law, *i.e.* incapable of confirmation. There is no such statement anywhere, and the evidence from which we are asked to infer it should not, in strictness, have been brought before us. The special verdict, however, not having been made up, the case has been argued before us as if there had not been any such special verdict. I do not object to that; but I doubt whether, in such a case, we have power to draw inferences of fact, as I assume that the procedure by special verdict was taken by consent; and I further doubt that, if we have such power, I should be prepared to draw the inference that the effect of the decree of the Council of Trent and of the decree Ne Temere was to make the marriage void for all purposes, in the sense of making it incapable of any kind of revalidation or confirmation. I was, and am, desirous of avoiding these questions, which I deem of a more or less formal character, and which, from the view I take of the case, do not really arise. On them I am therefore to be understood as not offering any definite opinion.

I consequently hold that the judgment dismissing the petition should stand, and that the motion to change it should be refused with costs.

GIBSON, J.:—

There are two questions for decision:—

I. Was the marriage which, though clandestine, was *prima facie* valid at Common Law, rendered incomplete or inoperative by reason of the contract contemplated by the parties being nullified by the Tridentine decree, considered not as legislation operating *proprio vigore*, but as terms infused into and forming a fundamental part of the matrimonial consent?

II. Was the marriage, if otherwise sufficient, made invalid by the Statutes 7 & 8 Vict. c. 81, and 26 & 27 Vict. c. 90?

The case was one which, from its nature, could only be satisfactorily disposed of by a Judge; and I shall deal with the questions raised as an appeal from the judgment of my brother Kenny, who conveniently took the so-called special

K. B. Div. 1912.

USSHER v. USSHER.

Gibson, J.

verdict in a form which practically left everything open for his decision. The special verdict was only one in name; it finds what was not in dispute, but leaves all the controverted matters on which my brother Kenny pronounced his decision undetermined, such as the alleged knowledge of the petitioner of the necessity of two witnesses, the Trent decree and its effect (of which the Court can take no judicial notice), the terms and meaning of the marriage contract and rite, and the alleged fundamental error supposed to vitiate the matrimonial consent. A special verdict proper in a matrimonial suit like this would be without precedent and unmeaning. The only object of a special verdict is to enable error to be brought on facts which, found in the verdict, raise a pure question of law. *Reg.* v. *Burke* (1) is an example of such verdict dealing with Catholic matrimonial law.

The evidence was very unsatisfactory. The petitioner was not examined. No canonist was called to elucidate the peculiar matrimonial law of the Church of Rome, which in this country is a voluntary Church, and whose discipline must be proved as a fact. The testimony of Father Fahy (who was probably subject to ecclesiastical censure for celebrating a clandestine marriage without banns, license, and the prescribed number of witnesses) is confused, contradictory, and unreliable. At one time he alleges that he knew that two witnesses were necessary, and that this was explained to the petitioner; then that he had an episcopal faculty dispensing with this requirement; and finally that he himself was competent to act as one of the witnesses. My brother Kenny, in one portion of his judgment, appears to have accepted the first version, which, if correct, would dispose of the first question in the case (that apart from statute), as, if the petitioner knew that there could be no sacramental marriage without two witnesses, he must be taken to have accepted a Common Law union without Church sanction. The same view would expose the priest to the grave blame of celebrating a religious marriage which he knew to be void.

On the evidence, I am unable to believe that the clergyman knowingly took part in an invalid rite, or that the husband, though

(1) 5 I. L. R. 549.

anxious to avoid publicity from the presence of a second witness, ever supposed that the marriage was other than a sufficient religious as well as civil ceremony. The parties were entitled to trust the celebrant for the regularity of the rite; they cannot have imputed to them a knowledge which he lacked. I shall deal with the case as one where spouses acting in good faith intended to become man and wife according to the law of the land and according to the law of the Church as well, never supposing that there was any conflict between the two.

The problem before us is threefold:—

1. Were there any terms or conditions expressly or impliedly incorporated in the matrimonial contract which purported and were intended to make it, in a particular event, inoperative, incomplete, or defeasible?

2. Can a present contract of marriage, intended to create there and then the relation of husband and wife, and solemnized by a priest, be defeated or made defeasible by any conditions or terms incompatible with such wedlock?

3. Were the terms or conditions relied on as having that effect such as our municipal law would recognize as legal?

Since the case of *Reg.* v. *Millis* (1), it must be taken as finally settled that our Common Law as to matrimony differed from that of all the other countries of the west in making a priest indispensable to the constitution of perfect marriage. The decision is controverted on historical grounds in Pollock & Maitland's History of English Law (ed. 1895), vol. ii, c. 7, s. 1. Their learned research has thrown much new light on the question, and supports the opinion of Willes, J., in *Beamish* v. *Beamish* (2). Their observations on the decretal letter of Alexander III (p. 369), and on *Del Heith's Case* and *Foxcroft's Case*, pp. 381–2, are of special interest and value. The decision of the House of Lords was largely based on the so-called law of King Edmund, requiring the presence of a Mass-priest "adunare" (to unite), and on the constitution of Lanfranc condemning a marriage without sacerdotal benediction as fornicatory. It is curious that in Scotland, where the matrimonial law of the Western Church has so long survived,

(1) 10 Cl. & F. 534. (2) 9 H. L. C. 274.

K. B. Div. 1912.

USSHER v. USSHER.

Gibson, J.

synodical statutes commanded in terms of at least equal stringency banns, witnesses, and priestly celebration, and denounced unions in violation of such provisions as sinful and fornicatory: Dowden, Mediæval Church of Scotland, pp. 253-6. Still the marriage though illicit was not invalid.

The requirement of a priest at a marriage to make it perfect is recommended by obvious public policy as some protection against the mischief of clandestine unions. But what was the function of the priest? According to the received Roman doctrine, stated by Cardinal Bellarmine in *De Sacramento Matrimonii*, and other writers, the priest was a witness and nothing more; the sacramental character of the nuptials arose out of the contract *inter partes*. By the old law of France (as appears from Pothier, cited by Willes, J.) (9 H.L.C. at pp. 322-23) the priest had not only to receive the consent of the parties, but he knit the bond of wedlock. What were the function and duty of the priest required by common law to be present at the nuptials? Tindal, C.J., answers the question, what had he to do? by saying he married them, using the customary form of words (p. 667). He describes his function as "intervention." So does Lord Cottenham at least four times in his speech, and he concludes with an emphatic statement to that effect (pp. 877, 883, 903, 906). The Lord Chancellor plainly treats priestly solemnization as essential to perfect marriage. In *Beamish* v. *Beamish* (1) Willes, J., whose inclination, from his view of *Millis' Case* (2), was probably to minimize the function of the minister, uses the expressions "intervention," "assisted," and "assent"; and he holds it to be the duty of the priest to receive the consents. Of the three reasons assigned by him and by Lord Wensleydale for the priest's presence, religious solemnization, attestation, and prohibition of forbidden unions, the first is the one referred to in the old texts on which the House of Lords relied so much in *Reg.* v. *Millis* (2). The law of Edmund required a Mass-priest to effect the union (*adunare*), because such priest was to celebrate the nuptial Mass. The constitution of Lanfranc forbade anyone giving in marriage "*absque benedictione sacerdotali*; *si aliter fecerit*,

(1) 9 H. L. C. 274. (2) 10 Cl. & F. 534.

non ut conjugium legitimum sed ut fornicatorium judicabitur." The decretal Epistle of Pope Evaristus, centuries before, declared: "*incestum haberi connubium cui sacerdos non adfuisset consecrassetque*," a passage translated in Ayliffe's Parergon, p. 364. A priest present in the body, but refusing to approve or perform any sacerdotal duty, would obviously not be such a person as the above passages contemplate. That the presence of the priest was originally required rather for sacerdotal purposes proper than for evidential purposes is supported by the fact that a cleric deposed and degraded from orders as well as benefice could effectually celebrate, orders impressing an indelible supernatural character on the priest, though his personal character made him absolutely untrustworthy as witness. The other two reasons for the presence of a clergyman, the verification and attestation of consent, and protection against illegitimate marriages, also would seem more or less to presuppose active and willing co-operation. Willes, J., states that there is no authority that parties could take advantage of the presence of a priest to marry one another in spite of him. Nor can I recall any instance of an irregular marriage in which the minister did not purport to bind the union, or use some kind of rite, though no particular form may be essential. Such an incident as that described in Manzoni's *Promessi Sposi*, c. 8, referred to by counsel, where Renzo and Lucia attempt to say the sacramental words before the surprised and frightened priest, Don Abbondio, represents a state of law quite unlike our Common Law. The impression produced by *Reg.* v. *Millis* (1) is that solemnization of some religious rite was necessary. How a marriage could be solemnized—made solemn—and invested with religious character by a priest being there who refused to perform any rite and expressed his disapproval, it is not easy to see. The word "celebrated" used in 7 & 8 Vict. c. 81, and other statutes, would seem to point to active participation, if not to a kind of rite. According to the Oxford Dictionary "to celebrate" is "to perform publicly and in due form." The word "publicly" may not be quite applicable, at least in statutes which use "celebrate" in reference to irregular marriages. "Celebrate"

(1) 10 Cl. & F. 534.

K. B. Div. 1912.

USSHER v. USSHER.

Gibson, J.

at least imports an act in due course, something more than passive hearing and seeing.

The Reformation settlement made some change in the Common Law; as a deacon, who is in no sense a Mass-priest, can officiate at a marriage. But it has made no other change as to orders. Our Common Law draws no distinction between Roman and other orders. Since the Reformation, apart from statute, a Catholic priest could marry two Protestants; an Anglican priest could constitute wedlock between two Catholics. The Common Law, save where legislation prohibits, still recognizes the validity of clandestine alliances, effected without banns, license, or witnesses, if celebrated by a priest.

Next, as to the Trent decree, passed to check clandestine marriages. As domestic legislation of a voluntary church it cannot affect in any way our matrimonial law, from which it differs strikingly. The canons attached to the decree as to diriment impediments, forbidden degrees, relationship between sponsors (*spiritualis cognatio*), affinity by fornication (see a curious case of this, Dowden, *supra*, p. 292), and the avoidance of marriage (not consummated) by solemn profession of religion by either of the spouses, illustrate this conflict.

The nullifying clause in the decree was the subject of much division of opinion, fifty-six members holding that marriage as a Christian sacrament could not be interfered with, while 133 considered that the contract, the matter of the sacrament, was subject to the control of the Church. The original proposal was to make three witnesses necessary; the priest was afterwards introduced to take the place of one, and no doubt the main object was to secure a witness specially authorized.

The decree differs from our Common Law in the following leading particulars:—

1. The priest must be "*parochus*," or his representative. When Selden wrote (Ux. Eb. column 693) there was some controversy about this "*parochus*." *Etiam in matrimonio conjungendo in Ecclesia Romana sufficere volunt magni tum theologi tum jurisconsulti parochum qui sacerdos seu presbyter nondum est.* The words "alio sacerdote"

in the decree would seem to show that the *parochus* must be *sacerdos*.

2. There must be at least two witnesses.

3. Parties who act in violation are "*inhabiles*," and the contract is void.

4. A silent, passive, or objecting priest satisfied the requirements of the decree.

A question has been raised as to the effect of the nullifying clause, which counsel suggest should be interpreted in a modified sense, particularly having regard to the power of dispensation and the capacity of the spouses retroactively to validate the contract by going through a subsequent ceremony. In the absence of expert evidence I should not care to express any confident opinion on the clause. The heading of the decree, and the decree itself, appear to the ordinary reader precise and clear. The power of dispensation (at present unexercised) may be no doubt wide, but neither such power nor the possibility of setting up the void marriage by a ratifying ceremony can be recognized as admissible in reference to matrimony in this country. The marriage must be good or bad once for all; a marriage if now ineffectual cannot be made operative by anything afterwards; there must be a new marriage. From a void marriage there can be no lawful progeny. Such issue could not be legitimated by any subsequent action of any religious or other authority. I shall assume for the purpose of my decision that under the decree the marriage is absolutely void. Possibly, however, there may be in Catholic ecclesiastical law some rule such as applies to nullity of marriage where the incapacity of one spouse makes the contract void, though it can only be avoided by a suit in the lifetime of the parties: *Brook* v. *Brook* (1).

I now take up the form of contract and rite. Various forms have been from time to time in use: see Selden, Uxor Eb., 670–676. No particular formula is indispensable. Thus, *volo* in the *Rituale Romanum* followed by *conjungo* is a sufficient expression of present promise. So, *accipio in meam*, without any troth-vow, is enough. We must interpret the form of contract adopted in this case by its own language as interpreted by usage. As in the Sarum and York

(1) 9 H. L. C., at p. 240.

K. B. Div. 1912.

USSHER v. USSHER.

Gibson, J.

Use set out in Selden, c. xxvii, the Anglican service and the official Irish Catholic Ritual, the ceremony consists (apart from ceremony and symbol) of three main members: 1. The inquiry followed by *volo*, "I will," which is clearly the preliminary espousals, as was the opinion of Willes, J., and Lord Chelmsford in *Beamish* v. *Beamish* (1). Willes, J., says: "The questions are then put to which the man and woman answer 'I will,' and so end the espousals." 2. The *accipio*, or troth, following the *traditio* of the woman. This is described as the *verba de praesenti*. 3. The *conjungo*. As to the *accipio* clause as forming the actual present contract, it is so stated by Willes, J., 9 H. L. C., at pp. 329, 330. "To the question at what part of the service the marriage is knit for civil purposes we answer in the words of the 39th section of Littleton, 'after affiance and troth plighted between them.'" Lord Chelmsford says (p. 357) the question "wilt thou have?" was merely preparatory to the contract. The considered decision of Alexander III on the point afterwards decided otherwise in *Reg.* v. *Millis* (2) (Pollock & Maitland, vol. ii, p. 369), and the constitutions of Poore, Bishop of Salisbury in 1217, the best expositor of the Sarum rite, describe the *accipios* as the recognized and vital formula of contract. The latter states "*In his enim verbis consistit vis magna et matrimonium contrahitur*" (9 H. L. C., at p. 316). The Sarum rite expressly makes the *accipios* the words of present matrimonial contract (Selden, 677.) The authoritative Anglican service (under which a deacon may officiate) in its rubrics and formula must be similarly construed. To construe, in a regular rite like the present, wedlock as complete with the *volos*, and the function of the priest as then at an end, would go far to frustrate the object—religious, evidential, and protective—attributed by the common law to his intervention. See also *Harrod* v. *Harrod* (3).

With regard to the *conjungo*, there is no question that according to Roman doctrine it is declaratory and not essential in any way, the function of the priest being reduced to that of a bare witness to the contract. In the Anglican rite the form is "I pronounce that they be man and wife together," words addressed

(1) 9 H. L. C. 327, 357.
(2) 10 Cl. & F. 534.
(3) 1 K. & J., at p. 16.

not to the spouses, but the congregation. The expression is "that they be," not "are" or "have become," though the meaning may be the same. Willes, J., interprets this as merely publication of a marriage already in being (9 H. L. C., p. 330). Having regard to the reasoning on which *Reg.* v. *Millis* (1) is founded, it may not be clear that in a Common-Law marriage rite the final pronouncement, *conjungo* or otherwise, might not have a greater force. In one of the forms in Selden (Ux. Eb., 675), "*conjungo in matrimonium*" is put into the husband's mouth as his present promise. The term as applied to the *sacerdos* is of constant occurrence. See an example in the constitution of Richard de Maresco, cited by Willes, J.; and in the Capitularies of Charlemagne a marriage is null without the priestly blessing (9 H. L. C., pp. 312, 313). "*Conjungo in matrimonium*" is not quite the same as *conjungo in matrimonio*; it might suggest an act towards completion. The point may be tested by the question: In this present rite, construed on Common Law principles, how would the matter stand if the priest or parties suddenly dropped dead, or if the priest, on some diriment impediment suddenly disclosed, or from apprehension that the *sponsa* (whose assent without words and indicated by a gesture only was allowed to be accepted) was acting under duress, declined to proceed? In case of a deaf and dumb marriage (as in *Harrod* v. *Harrod* (2)), the celebrant might not be satisfied that the troth-plight which he read was sufficiently understood. If no public confirmation is made, the only evidence of sacerdotal acceptance of the spouses' consents would be the reading over the troth-vow, and the parties repeating it, which in case of women was often dispensed with. It might appear desirable, to avoid controversy, that the priest should not merely accept silently the promises, which if at all deaf he might have imperfectly heard, but should also publicly declare his acceptance, and finally officially attest. *Harrod* v. *Harrod* (2) rather supports this view. In ordinary speech the clergyman is said to tie the knot. In *Harrod* v. *Harrod* (3) Wood, V.-C., says "When the hands of the parties are

(1) 10 Cl. & F. 534.
(2) 1 K. & J. 4.
(3) *Ibid.*, at p. 16.

K. B. Div. 1912.

USSHER *v.* USSHER.

Gibson, J.

joined together and the clergyman pronounces them to be husband and wife, they are married; they understand that by that act they have agreed to cohabit together and with no other person." As the consents *qua* contract between the spouses would be complete at an irregular wedding, without any special interrogation or reading of special forms, by virtue of the mere interchange of *accipios*, the importance of an overt official declaration and rite showing the priest's acceptance and confirmation, is manifest. This point as to whether the contract is held in suspense and is incomplete at Common Law till such confirmatory declaration, does not directly require decision. I do not decide it, but I have discussed it as it has been argued, and may be, to some extent, relevant. We are construing here a particular form of contract and rite professing to be normal and usual, and its construction cannot be governed by the consideration that an irregular marriage without any special form of contract or rite might constitute legal wedlock.

In the present case, though the marriage was clandestine, the ceremony was perfect in all its parts save as to attestation, a pure matter of proof and form. The only impeachment of the contract *qua* contract must be found—1. in the reference to the rite of the Church in the question preceding the *volo*, the espousals; 2. the clause as to the permission of the Church in the troth.

The mention of the rite in the espousals cannot be a condition. "Rite" imports the form of religious ceremony which the parties understood the priest professed duly to perform. I doubt if the form would include attestation, which, under the Trent decree, was only required to validate the contract, and not as in any way forming part of a religious celebration. The rite proper is not touched by the decree; it existed substantially in its present shape long before the Council; and departure from the rite in non-essentials could not affect the marriage. The preliminary *volo* is no part of the actual present consents exchanged between the spouses. The Sarum form, like the present form, contemplates a regular celebration *in facie ecclesiae*, and did not therefore require any special attestation.

The clause as to the permission of the Church in the *accipio* sentences affords a more plausible argument. First, does the clause govern the whole troth-vow? or at least the part "I take thee to be my lawful wife, to have and to hold from this day forward till death do us part," the intermediate promises relating to matrimonial duty rather than the formation of the contract, though they are part of the contract? In the Anglican rite, after the *traditio*, the parties are directed to give their "troth in this manner," and then follow the *verba de praesenti* which all form the "troth." In the form before us the words "Thereto I plight my troth" are the solemn affirmance of all that goes before. But there are other reasons for concluding that the "permission" clause must govern the *accipio*. If the clause points to possible diriment conditions, then inasmuch as such conditions would destroy the contract, as the chief contractual word is *accipio*, it must be operated on by the apparent condition. Again, "till death do us part" must be controlled by the apparent condition. The life-long obligation of the spouses is a vital part of the contract; it need not be expressed; it is inherent in the essence of matrimony. Hence the permission clause must attach to the entire nuptial promises, including *accipio*.

Next, what does the formula "if Holy Church will it permit" mean? It replaces the word "ordain" in the Sarum use; the change was made before Selden wrote (Selden Ux. Eb., 685). The interpretation when the Sarum use was in force may not be the same, in some respects, as since the Reformation. Without exhaustive historical research and examination of all the liturgies, foreign as well as English, it would be impossible to arrive at a certain conclusion. Conjecturally four constructions have been suggested.

1. The clause contemplates possible impediments, including those before the nuptials. Dealing with the word "ordain," Selden expresses the opinion that it conveys "*Si aliqua sanctio ecclesiastica non refragetur*," that is "if some Church law do not oppose." This may be right, but the expression is certainly awkward, and the tense might suggest another interpretation. Selden in his Latin alters the tense of "ordain" and "permit," and substitutes *ordinaverit* and *permiserit*. Discussing the expression

K. B. Div. 1912.

USSHER v. USSHER.

Gibson, J.

Si ecclesiæ placuerit (which he treats as a condition to the contract), Sanchez regards ante-nuptial impediment as included.

2. The phrase indicates a future decision by ecclesiastical authority as to possible diriment impediment dissolving the *vinculum*, or as to subsequent misconduct justifying divorce *a mensa et thoro.*

3. It looks forward to the final *conjungo* to be pronounced by the priest as the accredited spokesman of the Church. The word "ordain" and the tense might rather aid this construction.

4. It is a kind of "*Ecclesia volente*," which, like "*Deo volente*," imports no real condition.

It is difficult on the materials before us to decide between these interpretations, which are all speculative and conjectural.

The above inquiry suggests wonder on the one hand why this obscure clause has been so long left unelucidated; and on the other why, useless and perhaps misleading, it has survived so long and kept its place in service books. Whatever construction be given to the clause, it cannot affect this marriage.

It is not found in many of the formularies; it is obviously no part of the essential matrimonial promise. Found in the Sarum use, it was not in the ritual of the Northern Province. Wedlock in York could not have been materially different from that in Canterbury. In the Catholic rituals the clause is not always present. The Trent decree prescribes no form of matrimonial consent for the contract.

I do not think that the clause contemplates attestation at all. Attestation could not have been included in the Sarum formula applicable to a public Church marriage where no special attestation was required. The parties saw at the present wedding that there was only one witness, without appreciating its ecclesiastical effect: would such deficiency of attestation be a matter which the parties would ever suppose was covered by the clause, and as forming a part of their contract?

Again, the phrase is vague and sweeping; it is no more than a pious saving clause, adds nothing that would not be implied, and cannot be read as a special term differentiating a contract containing it from one without it. If *accipio in meam* is, without more, a sufficient expression of consent, and

would knit an irregular union, it is inconceivable that the introduction of the clause, which is in universal use in Ireland, should put matrimony contracted with all the rites of the Church in a worse position and expose it to contractual invalidity from which irregular wedlock was free.

Even more fundamental objections, founded on general legal principle, remain.

Present wedlock creates an immediate status, the basis of family life, and cannot be made defeasible or be suspended by any form of condition. A contract *per verba de futuro* might be conditional, but any such condition was discharged by intercourse attributable to the contract, not so much perhaps on the ground of waiver, as on the ground that contract and consummation together constituted very matrimony incompatible with the condition. Complete present matrimony (in which consummation is not an essential ingredient) *a fortiori* must be governed by the same principle, and does not allow of any repugnant condition.

The form of the contract is governed by the *lex loci contractus*: *Brook* v. *Brook* (1); the essentials by *lex domicilii*. If the clause introduces, or seeks to introduce, into the contract conditions for dissolving or affecting the contract which our law does not recognize as legal, it can have no effect. The domestic law of the Catholic Church contains diriment conditions quite unlike ours, and nullifies marriages which are valid here: *Reg.* v. *Burke* (2). The Church can constitute new impediments "*quae matrimonium non solum impediunt sed et reddunt nullum*," as appears by papal decree or bull of 1794, found in the edition of Trent decrees and subsequent bulls published at Rome, 1834, pp. 449, 450. The most striking instance of conflict between the two laws is that of marriage (unconsummated) being made void by solemn profession of religion by either of the spouses. The point is discussed by Lyndewode (usually called Lyndwood), at p. 128: ed. Oxford, 1679. His *Provinciale* is a collection of Provincial Constitutions from Langton to Chichele, with notes. The contract must be construed so as to give it civil effect, and cannot

(1) 9 H. L. C. 193. (2) 5 Ir. L. R. 549.

K. B. Div. 1912.

USSHER v. USSHER.

Gibson, J.

be defeated or defeasible by attempted introduction of unlawful conditions, or by reference to private religious convictions of the spouses. The Marriage Law Report, 1868, states (p. 11), "Except in case of Quakers and Jews, no marriage in England is liable to be held void on any ground connected with the religious belief or persuasion of both or either of the parties, in whatever form, by whatever persons, or in whatever place, it may have been solemnized."

Had the parties here known that their contract was in the eye of the Church void, there could be no question that error was excluded. The contract would be unimpeachable, for in that case civil wedlock would have been what was contemplated. Could their ignorance of the ecclesiastical necessity of attestation make any difference?

A topic strongly urged was that, if there was a marriage valid in law but void in religion, an intolerable situation arose, a duty of cohabitation being civilly imposed which the Church would regard as sinful. This difficulty had arisen long before the Reformation. A true marriage might be effected which could not be established by the rules of canonical proof, and was thus practically in law dissoluble at will. One of the spouses might during the life of the previous partner marry again *in facie ecclesiae*. The Court Christian would decide that such last wedlock was good, and the second wife might be compelled by the ecclesiastical Judge to live in what the confessor would forbid as adultery: Pollock & Maitland, vol. ii., p. 383. Hostiensis, a writer quoted by Lyndwood, says (in a passage cited at p. 383), as to this "*Nam in judicio animae consuletur ut non reddant debitum contra conscientiam; in foro judiciali excommunicabuntur nisi reddant; tolerent ergo excommunicationem.*" Lyndwood, who wrote more than a century before the Council of Trent, describes conditions which if agreed on between the spouses would be fatal to the existence of valid marriage, such as conditions that there should be no issue or no marital relations, or that the parties should separate after a time: Lyndwood, p. 45. Such conditions must have been secret; if declared to the priest at marriage, he would have at once repelled the sinful profaners of a sacred ordinance. Their public marriage, concealing the

illicit bargain, would have been *in foro externo* of perfect validity, but the confessor would be bound, if Lyndwood is correct, when the truth was revealed, to treat the union though legal as sinful and a nullity. *Reg.* v. *Burke* (1) is an example of a case where this hardship from the strife between religion and law arose. It is inevitable. A marriage may be good in the view of the Church and void according to our law; conversely bad as to the former, and valid as to the latter.

Error or mistake as to religious consequences cannot affect the completeness or effect of the contract. Assuming that civil and sacramental wedlock were contemplated as one and inseparable, and that the spouses regarded the religious element as fundamental, the marriage, completed according to the requirements of municipal law, cannot be treated as wrecked and destroyed. The primary intention to which the Court must give effect was the constitution of the status, and where law and conscience cannot be reconciled, the former must prevail. Public policy and the claims of issue are paramount. The Marriage Law Report states (p. 13) that a marriage contracted between Catholics in the presence of any Roman Catholic priest in Ireland, though contrary to the law and discipline of their own Church, would be legally valid. I can discover no trace of authority that a marriage in due form can be nullified or treated as non-existent on any such grounds as are here relied on.

In *Reg.* v. *Burke* (1), a case on prohibited degrees, where the verdict found the first marriage was null and void by the discipline of the Church, it was held that it was valid in law, and supported a conviction for bigamy in respect of a second marriage. The rite there was probably the same as in the present case. The contract of civil marriage was not affected by its ecclesiastical nullity, or by the spouses never having contemplated what the Church deemed sinful cohabitation.

In *Thelwall* v. *Yelverton* (2) there were no witnesses at the marriage celebrated by Father Mooney. This appears from *Yelverton* v. *Longworth* (3). Neither the acute advocates nor

(1) 5 Ir. L. R. 549.
(2) 14 Ir. C. L. R. 188.
(3) 4 Macqueen, H. L., at pp. 770 and 846.

K. B. Div. 1912.

USSHER *v.* USSHER.

Gibson, J.

the learned Judges appear to have had any suspicion that this circumstance could affect the validity of the marriage contract. *Ogden* v. *Ogden* (1) supplies a strong argument against the petitioner. There a domiciled English girl married Philip, a domiciled Frenchman, in England, in *bona fide* ignorance of French law (p. 49) requiring the consent of his father, which was part of the French ceremony of marriage (p. 75). He divorced her on this ground in France, and she married again in England. Her second husband got a decree of nullity on the ground that her French husband was alive. She undoubtedly intended when marrying Philip to be his wife *semper et ubique*, whereas she was only a wife in England and not a wife in France. Philip had two wives, one for English purposes, one his general spouse in France. There was there a greater misconception of the nature and effect of the contract than exists here, where the complete civil status, valid everywhere, is secured.

I, therefore, hold that, unless there be something in our statute law to the contrary, this marriage, effected between capable parties in accordance with the *lex loci*, is not affected in any way by their ignorance that they were violating the discipline of the Church, under which their union for religious purposes was void.

I have dealt with the case on the assumption that the petitioner intended a sacramental marriage, and that, had he known that such object could not be attained, he would have declined to proceed. I am not satisfied that he ever envisaged marriage in its religious as distinct from its civil aspect, or that there was any such error as influenced his action. As the petitioner was not examined, and no question was suggested for the jury on the point, I notice it only in order to avoid misconception without expressing any opinion.

II. There remains the question whether this marriage was invalidated by reason of 7 & 8 Vict. c. 81, and 26 & 27 Vict. c. 90.

First it is said that as the Act of 19 Geo. II, c. 13, was then in force, the word "now" in section 3 of the statute of 7 & 8 Vict.

(1) [1908], P. 46.

c. 81, excludes the present case from the operation of that section. The Act of 19 Geo. II, c. 13, was repealed by 33 & 34 Vict. c. 110, sect. 39; and the argument of petitioner would make that repeal meaningless and abortive. It is quite impossible to treat the Act of Geo. II as in a manner incorporated with 7 & 8 Vict. c. 81, so that, notwithstanding repeal, it continues in force under sect. 3.

The next point made was that in section 3 "lawfully" brought into play all the then marriage law of Rome, a hopeless contention, opposed to the Marriage Law Report, p. 11.

The final argument was that the words "lawfully celebrated" imported a legitimate public celebration, and did not cover a clandestine irregular union; and that 26 & 27 Vict. c. 90, supported this view. Whether Parliament ever consciously intended to recognize irregular marriages may be doubtful; but if a clandestine marriage could have been celebrated when the statutes passed, there is no intention disclosed to make them illegal. "Celebrated" usually, no doubt, imports due and normal celebration, but not necessarily so; the term is used in some statutes in reference to irregular wedlock. If the point was a good one, it would apply even though there had been two witnesses, for their presence could not have altered the character of the rite, which was clandestine: Lyndwood, p. 276.

Monsell's Act directs witnesses and contemplates regular wedlock, but it deals only with registration, and does not touch the validity of the marriage contract as such.

To the decree, which was a positive law as to proof of contract, this Court can give no effect. It subjected for the first time clandestine marriages, always reprobated by the Church, to an effectual but partial limitation in imposing the condition that a priest was to be present, who must be the parish priest or his representative, and that there must be at least two witnesses. The Marriage Law Report, pp 13, 38, states that a marriage between Catholics can be lawfully celebrated in Ireland without banns, license, notice, or consent, or witnesses, by any priest, even by a degraded priest, although contrary to the law or discipline of their Church. As regards illicit unions, Ireland therefore lacks the protection enjoyed by countries where the decree is accepted as part of the matrimonial law.

K. B. Div. 1912.

USSHER *v.* USSHER.

Gibson, J.

Out of deference to the able arguments at the Bar, I have considered the case in all the aspects discussed, though many of the questions may only remotely touch the actual point for decision.

I concur in the conclusion of my brother Kenny, of My Lord, and of the Lord Chief Baron, that the marriage was clearly valid, and the judgment dismissing the petition must be affirmed.

Solicitors for the petitioner: *Montgomery & Chaytor.*
Solicitor for the respondent: *P. J. Moran.*

J. G. T.

HENNEBERRY, APPLICANT; DOYLE, BROTHERS, RESPONDENTS (1).

Appeal.
1911.
Dec. 18, 19, 20.

Workmen's Compensation Act, 1906, *s.* 1 (1)—*Workmen engaged by different masters in a common employment—Interchange of work with knowledge and permission of employers—Custom of port—Unloading collier—Evidence.*

Four men were engaged in the unloading of a collier. Three of these, a tipper and two winchmen, were employed by the shipowner; the fourth, a barrow-man, was employed by the coal merchant who chartered the ship. The tipper got tired of his work, and asked the barrow-man to exchange work with him, which was done, the barrow-man tipping the tubs of coal as they were hoisted from the hold into the barrow, and the tipper wheeling off the barrow when full. While the barrow-man was thus occupied in tipping he was accidentally knocked into the hold by a tub and was killed. The three surviving workmen proved that it was the habit of men so employed at the port to interchange work in this manner when unloading colliers, and there was no evidence to the contrary, and the employers did not deny their knowledge of the practice, or allege that they prohibited it. There was no other evidence of any custom to interchange work at the port when unloading coal.

Held, that no such custom was proved; but that, as the four men were at the time of the accident engaged in the common employment of getting the coal from the ship to the premises of the coal merchant, the interchange of work was in the nature of a deviation from the workman's special employment for the benefit, and with the sanction, of the employer; that the accident arose out of and in the course of the deceased's employment; and that his dependants were entitled to compensation.

APPEAL by the employers from the award, dated the 28th September, 1911, of His Honour Judge Brereton Barry, awarding the dependants of Samuel Henneberry £150 for his death by accident arising, as they alleged, out of and in the course of his employment by the appellants.

The appellants were owners of a coal store at New Ross, in the county of Wexford; and the fatal occurrence took place

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

Appeal. 1911.

HENNEBERRY v. DOYLE.

while a cargo of coal was being unloaded at New Ross Harbour, from a vessel chartered by them. The workman was admittedly employed by appellants as a barrow-man, and paid by them for his services in that capacity. Three other men, Martin Browne, as tipper, and Michael Culleton and George Cullen, as winchmen, were employed and paid by a ship-broker named Dunphy, on behalf of the ship, the captain being bound to put the coal on deck, whence it was removed on shore by the barrow-men, the tubfuls being tipped into the barrows by the tipper. On the occasion of the accident the ropes of Cullen's winch got out of order, and he called to Browne to help him in repairing the rope, Culleton in the meantime taking Browne's place at tipping. A short time afterwards Culleton asked the deceased man Henneberry to take a spell at tipping; and they changed places, Culleton taking Henneberry's barrow. While Henneberry was tipping, the tying of the tub slipped and knocked Henneberry into the hold. He died from the effect of the injuries thus received. In the unloading the men sometimes used ropes belonging to the appellants, Doyle Bros., and sometimes ropes belonging to the ship. They were using the latter at the time of the accident. The winches belonged to Doyle Bros. The Doyles sometimes paid the winchmen and tippers, but when they did so, they got credit for the amount out of the freight. The three men, Browne, Culleton, and Cullen, were examined on behalf of the applicant, Mrs. Henneberry, widow of the deceased man; and they all swore that in unloading ships at New Ross it was customary to give "spells," viz., when one of the men employed got tired of his particular work, or wished for a change, to exchange places and work with another man engaged in the common operation of discharging the cargo.

At the close of the evidence for the applicant, L. Kelly, on behalf of the employers, submitted that the accident did not arise out of and in the course of Henneberry's employment, inasmuch as he was employed as a barrow-man, and "tipping" was no part of his employment, that Browne and Culleton were servants, not of Doyle Bros., but of the owners of the ship, and that at the time of the accident Henneberry had abandoned the employment of his own employer to do the work of another.

The learned Judge found that Browne and Culleton were paid by the ship; that Henneberry was paid by Doyle Bros.; that at the time of the accident all were engaged in a common object, viz., the unloading of Doyles' coal; and that the system of taking spells or interchanging was not prohibited, but was well known to, and recognized by, the employers as a custom. Accordingly His Honour found that the accident arose out of and in the course of the employment of the deceased, and made the award above stated.

Hanna, K.C., and *L. Kelly*, for the appellants:—

Here the workman at the time of the accident had, without authority or permission of the employer, abandoned the comparatively safe work which was assigned to him, and voluntarily undertaken other work, attended with greater risk, which men employed by the ship-owners were engaged and paid by them to perform. Under these circumstances no claim for compensation can be sustained by his dependants. In *Whelan* v. *Moore* (1), where a man employed to drive the horse attached to a canal boat, at the request of the steerer, who was also master of the boat, temporarily took charge of the helm, and while so doing fell overboard and was drowned, compensation was refused to his dependants. There, it is true, the owner of the boat had forbidden the driver to steer, but if the act was within the scope of the employment, such a prohibition is immaterial in such cases: *Conway* v. *Pumpherston Oil Co.* (2). The Lord President, in giving judgment in that case, says:—"There are two ways in which a servant may be outside the sphere of his employment. One way is where a servant does some other work than that for which he is engaged"; and he instances the case of a footman taking the reins and driving with the permission of the coachman. To the same effect is *Kerr* v. *Baird* (3). See also *Whitehead* v. *Reader* (4), *per* Collins, L.J., at p. 51. In *Weighhill* v. *South Heaton Coal Co.* (5) there was a gross disobedience of orders on the part of the workman. That was distinguished

(1) 43 Ir. L. T. R. 205.
(2) 4 Butterworth, 392.
(3) *Ibid.*, p. 397.
(4) [1901] 2 K. B. 48.
(5) 4 Butterworth, 141.

Appeal. 1911. HENNEBERRY v. DOYLE.

in *Harding* v. *Brynddu Colliery Co.* (1) by the English Court of Appeal, Buckley, L.J., dissenting. The two other members of the Court followed *Conway's Case* (2). The earlier case of *Losh* v. *Evans* (3), also a decision of the Court of Appeal in England, is much in point here. A girl was working at a machine which was kept in motion by an engine which was specially in charge of another employee. The engine stopped while the man in charge of it was temporarily absent, and the girl, notwithstanding the remonstrances of her fellow-workers, attempted to set it going, and, in doing so, was injured. The Court, affirming the decree of the County Court Judge, held that the accident did not arise within the scope of her employment, Mathew, L.J., dissenting. See also *Barnes, Appellant*; *Nunnery Colliery Co., Respondents*, in the House of Lords, W. N. 1911, p. 251 (4). There boys employed in a mine who, according to the regulations, should have walked from the bottom of the pit to their work in the colliery, got into the first of a train of empty tubs which were just starting down an incline to their destination, and one of the boys, the boy for whose death compensation was claimed, was struck by the roof of the passage and killed. Their going by the tubs was clearly and absolutely prohibited, but, as the accident was fatal, misconduct would not have disentitled the dependants to recover compensation if it occurred in the course and within the scope of the employment. The House of Lords, affirming the decision of the Court of Appeal, held that travelling in the tubs was not within the scope of the boy's employment. We rely on this case principally for the words in the judgment of Lord Atkinson where, quite apart from misconduct or disobedience, he refers to the "new and added" peril occasioned by exceeding the scope of the employment, and which cannot be imposed by the employee at his own volition upon the master. Here the peril was distinctly increased, tipping being admittedly a work exposing the workman to more danger than the mere wheeling barrowfuls of coal.

(1) 4 Butterworth, 269.
(2) *Ibid.*, 392.
(3) 5 Minton Senhouse, 17.
(4) Since reported, [1912] A. C. 44.

Reed v. *Great Western Railway Co.* (1); *Williams* v. *Wigan Coal and Iron Co.* (2); *M'Keown* v. *M'Murray* (3) are also cases of compensation being refused where the accident occurred outside the scope of the employee's immediate duty.

The alleged custom would be unreasonable, and there is no evidence of its existence.

Lupton, for the applicant, Mrs. Bridget Henneberry, widow of the deceased workman :—

It was not necessary for the applicant to prove a legal custom for the interchange of work in unloading. It is sufficient to show that the practice existed, and that it received the sanction of the employers. There is no actual finding by the Judge that there were two distinct employments; but he does find that the four men were engaged in carrying out a common object for the benefit of the Doyles. All the tackle and appliances for discharging the cargo were supplied by the Doyles.

The question is really one of fact on which this Court will not disturb the finding of the Judge if there be any evidence at all in support of it: *Byrne* v. *Baltinglass Rural Council* (4); *Simmons* v. *Heath Laundry Co.* (5). *Conway* v. *Pumpherston Coal Co.* (6) is strongly in my favour; so also is *Lovelady* v. *Berrie* (7).

As to the cases cited on the other side, there was in *Whelan* v. *Moore* (8) no custom or practice of interchanging work known to the employer. In *Reed* v. *Great Western Railway Co.* (1), and in *Williams* v. *Wigan Coal and Iron Co.* (2), the employees were engaged on their own business, and not that of their employers, when the accident occurred. *M'Keown* v. *M'Murray* (3) was a case of deliberate disobedience to regulations to save the employees a very little trouble.

Hanna, K.C., in reply :—

What is found by the learned Judge is not permission by the employers, but a custom, which if it really existed, would be part

(1) [1909] A. C. 31.
(2) 3 Butterworth, 65.
(3) 45 Ir. L. T. R. 190.
(4) *Ibid.*, 206.
(5) 3 Butterworth, 200.
(6) 4 Butterworth, 392.
(7) 2 Butterworth, 62.
(8) 43 Ir. L. T. R. 205.

Appeal.
1911.
HENNEBERRY v. DOYLE.

of the contract of service. As the parties in this case dealt with it throughout as a question of custom, they ought not to be allowed to change their ground.

THE LORD CHANCELLOR:—

Nothing like a custom has been proved to exist in New Ross for the interchange of servants engaged in unloading coal. The phrase does exist in the notes of the County Court Judge, and he may have taken the view that some sort of custom prevailed. We do not think so at all, and we do not see anything to prevent an employer from prohibiting such interchange. The tippers were not in the employment of Doyle, but were in the employment of Dunphy on behalf of the ship. The object of the whole transaction was to deliver coal to Doyle; the whole transaction was for his benefit. Doyle was entitled to deduct the pay of the winchmen or tippers if he paid them, as he often did, from the freight. He was perfectly familiar with every step taken throughout the whole proceeding. I think that Henneberry was at liberty to act as he did on this occasion, and that there was evidence to justify the Judge in finding that what he was doing should be treated as incidental to his employment under Doyle. That is in substance what the County Court Judge found; and I think that the accident arose out of and in the course of the employment, and that the award of the Court below should be affirmed.

Having regard to the great importance to employers of the point raised as to the alleged custom, we think that the appeal was reasonable, and that each party should bear his own costs.

HOLMES, L.J.:—

It is clear upon the evidence that Doyle was the real and only master of the man killed. It is clear also that no custom has been established in the case. This is the simple case of a master with a servant who is in the habit from time to time of doing work for another person for the benefit, and by the direction, of his own master.

CHERRY, L.J. :—

I concur. There are many cases which have come before the Court in which a workman in a special employment has deviated from it to do something else for the benefit of his master. The question in such cases is—did the employer know of and sanction such deviation? If he did, the servant was acting in the course of his employment; if not, the servant was disobeying orders, and, therefore, outside the Act. Here the interchange of work took place with the knowledge and acquiescence of the employer; and, therefore, I think that the claimant is entitled to recover.

Solicitor for the appellants: *M. Good.*
Solicitor for the applicant: *William F. Browne.*

W. G.

ANNIE F. CONLAN AND THOMAS F. COYLE *v.* CARLOW COUNTY COUNCIL AND JAMES O'NEILL AND WILLIAM M. BYRNE (1).

K. B. Div.
1912.
April 24, 29.

Assignment—Part of debt—Right of assignee to sue—Equitable assignment—Supreme Court of Judicature Act (Ireland), 1877 (40 & 41 *Vict. c.* 57), *s.* 28, *sub-s.* 6; *s.* 27, *sub-s.* 4.

An assignment of part of a debt is not within s. 28, sub-s. 6, of the Judicature Act (Ireland), 1877.

Opinion of Bray, J., in *Forster* v. *Baker* ([1910] 2 K. B. 636) concurred in.

Decision of Darling, J., in *Skipper and Tucker* v. *Holloway and Howard* ([1910] 2 K. B. 630) dissented from.

But the assignee of part of a debt may maintain a Common Law action in respect of such part, where all persons interested in the debt or in resisting it are parties to the action.

CASE STATED by Mr. Serjeant Moriarty, Commissioner of Assize, on the hearing of a civil-bill appeal. The case set out as follows :—

"The civil bill in this action claimed £40, being the amount of two several sums of £20 each alleged to be due and payable by

(1) Before GIBSON and BOYD, JJ.

K. B. Div. 1912.

CONLAN v. CARLOW CO. COUNCIL.

the defendants, the County Council of Carlow, on the 1st day of April and on the 1st day of July, 1911, to the defendant, William M. Byrne, as trustee for and on behalf of the plaintiffs under an assignment in writing, dated the 9th day of November, 1909, whereby the defendant, James O'Neill, under his hand, absolutely assigned to the defendant, William M. Byrne, as such trustee for the plaintiffs as aforesaid, the sum of £164 16*s.*, payable by instalments of £20 per quarter, until the said sum of £164 16*s.* should have been paid, each of said quarterly instalments to be paid out of the salary of the defendant, James O'Neill, as accountant of the defendants, the County Council of Carlow, which should accrue due on the 1st of January, 1st of April, 1st of July, and 1st of October in each year. It was heard by the County Court Judge for the county of Carlow during the Michaelmas Sessions of 1911, who, having dismissed the defendant, William M. Byrne, out of the said suit, gave a decree in favour of the plaintiffs against the defendants, the County Council of Carlow, for the said sum of £40. From this decision the defendants, the County Council of Carlow, duly appealed, and the appeal was heard before me at Carlow, as Commissioner of Assize, on Wednesday, the 28th day of March, 1912.

"The following facts were admitted by both sides, and are found by me:—

"1. The defendant, James O'Neill, was at the dates hereinafter mentioned, and is, the accountant to the defendants, the Carlow County Council, in respect of which office he receives a salary of £130 per annum, payable quarterly on the 1st January, 1st April, 1st July, and 1st October in each year.

[Paragraphs 2, 3, and 4 set out facts showing that the defendant, James O'Neill, had become indebted to the plaintiffs in the sum of £141 13*s.* 6*d.*, in respect of moneys paid by them as surety for him, and that on the 29th March, 1909, judgment was entered up by the plaintiffs against the defendant, James O'Neill, for the said sum of £141 13*s.* 6*d.*, and £5 11*s.* for costs, making in all the sum of £147 4*s.* 6*d.*, and that the plaintiffs had obtained an instalment order under the Debtors Act against the defendant, James O'Neill, directing him to pay the amount due on the judgment and costs by quarterly instalments of £20 each.]

"5. The amount due by the defendant, James O'Neill, to the plaintiffs on foot of the said judgment and interest thereon, and for the costs of the said proceedings under the Debtors Act, amounted at the date of the agreement in the next paragraph hereof mentioned to £164 16*s*.

"6. By writing under the hand of the defendant, James O'Neill, addressed to Richard J. Keogh, Esq., Secretary of the defendants, the County Council of Carlow, and to the National Bank, Limited, Carlow Branch, Treasurer of the said County Council, dated the 9th day of November, 1909 (being the authority referred to in the agreement of even date next hereinbefore mentioned), the defendant, James O'Neill, thereby authorized and required them to pay to the defendant, William M. Byrne, on behalf of the plaintiffs, the said sum of £164 16*s*. by quarterly instalments until the said sum of £164 16*s*. should have been paid, each of the said instalments to be paid out of his salary as accountant to the defendants, the County Council of Carlow, which should accrue due on the 1st January, 1st April, 1st July, and 1st October in each year, and the defendant, James O'Neill, thereby agreed that the authority thereby conferred should be a sufficient discharge from him to the defendants, the County Council of Carlow, for the payment of the said sums. A copy of this writing is set out in the schedule to this case.

"7. The said writing in the last paragraph mentioned was served on the said Richard J. Keogh and Thomas H. O'Donnell, Manager of the National Bank, Carlow, on the 10th day of November, 1909.

"8. The defendants, the County Council of Carlow, did not pay the quarterly instalments of £20 each, amounting to £40, which became due on the 1st April, 1911, and 1st July, 1911.

"Serjeant Molony, K.C., and D. J. O'Brien (instructed by John J. Duggan, solicitor) appeared for the plaintiffs, and contended that the written authority of the 9th November, 1909, was a valid assignment both under the provisions of the Judicature Act and in equity, and that the Court was bound to give effect to all equitable rights, and affirm the decree. T. S. F. Battersby, K.C., and Edmund Lupton (instructed by Mr. C. H. Thorp, solicitor) appeared for the defendants, the County Council of Carlow, and

K. B. Div. 1912.

CONLAN v. CARLOW Co. COUNCIL.

contended that they were not liable on the grounds, *inter alia*, that the writing mentioned in paragraph 7 hereof was not an assignment in law or equity, and if it was an assignment, it was of part only of a debt, and that there could not be a valid assignment thereof, and that by reason thereof the plaintiffs were not entitled to succeed, and that the said decree should be reversed with costs.

"I asked counsel for the plaintiffs and the defendants, the County Council of Carlow, if they were willing that I should state a case, and counsel for both plaintiffs and the defendants, the County Council of Carlow, consented thereto.

"The question for the opinion of the Court is whether, upon the facts stated, the plaintiffs are entitled to an affirmance of the decree against the defendants, the County Council of Carlow, for the said sum of £40."

Serjeant Molony, K.C. (with him, *D. J. O'Brien*), for the plaintiffs:—

There may be a valid assignment of part of a debt under section 28, sub-sect. 6, of the Judicature Act (Ireland), 1877. Prior to the Act, there might have been a good equitable assignment of part of a debt: The Laws of England, by the Earl of Halsbury, vol. v, p. 375. In the case of an equitable assignment, however, it was necessary to make the assignor a party, either as plaintiff or defendant. The object of s. 28, sub-sect. 6, of the Judicature Act was to get rid of this necessity, and to enable the assignee, subject to the requirements of the section, to sue in his own name, without joining the assignor. It deals with procedure only, and does not cut down existing rights. The words, "any debt or legal chose in action" are wide enough to cover part of a debt or legal chose in action. Part of a chose in action is itself a chose in action.

[He referred to: *Brice* v. *Bannister* (1); *Tom Shaw & Co.* v. *Moss Empires, Limited, and Bastow* (2); *Skipper and Tucker* v. *Holloway and Howard* (3); *Forster* v. *Baker* (4).]

(1) 3 Q. B. D. 569.
(2) 25 Times L. R. 190.
(3) [1910] 2 K. B. 630.
(4) *Ibid.*, 636.

But even assuming that section 28, sub-sect. 6, of the Judicature Act does not apply to an assignment of part of a debt, yet the assignee of such part can recover in a common law action constituted like the present where the assignor, the legal owner of the debt, is made a party as defendant. Prior to the Judicature Act a suit in this form could be maintained in equity in respect of an equitable chose in action, and by that Act all Courts are now bound to recognize equitable rights in the same manner as the Court of Chancery would have done before the Act: section 27, sub-sect. 4. Where there is a conflict or variance between the rules of equity and the rules of law, the rules of equity are to prevail: section 28, sub-sect. 11. The efficacy of equitable assignments is not in any way impaired by the Judicature Act: *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1), *per* Lord Macnaghten, at p. 461. The only effect of non-compliance with the provisions of section 28, sub-sect. 6, is that the legal owner of the debt must be made a party either as plaintiff or defendant: *E. M. Bowden's Patents Syndicate, Limited* v. *Herbert Smith & Co.* (2), *per* Warrington, J., at p. 91; *Langtry and Irwin* v. *O'Rourke* (3). This course has been followed in the present case by joining the assignor as defendant.

Lupton (with him, *Battersby, K.C.*) for the defendants, the County Council of Carlow:—

An assignment of part of a debt is not within section 28, sub-sect. 6, of the Judicature Act. If it had been intended to include such a case, the words would have been, "any debt or part of a debt." The Legislature never intended to penalize a debtor by subjecting him to several actions by different persons for the same debt. In *Brice* v. *Bannister* (4) the point was not taken that the assignment was only of part. The decision has been questioned in subsequent cases: *Durham Brothers* v. *Robertson* (5), *per* Chitty, L.J., at p. 774; *Jones* v. *Humphry* (6), *per* Darling, J., at p. 14; *Hughes* v. *Pump House Hotel Company* (7), *per*

(1) [1905] A. C. 454.
(2) [1904] 2 Ch. 86.
(3) 39 I. L. T. R. 80.
(4) 3 Q. B. D. 569.
(5) [1898] 1 Q. B. 765.
(6) [1902] 1 K. B. 10.
(7) [1902] 2 K. B. 190.

K. B. Div. 1912.

CONLAN v. CARLOW CO. COUNCIL.

Mathews, L.J., at pp. 195, 196. In *Mercantile Bank of London* v. *Evans* (1), Vaughan Williams, L.J., was evidently of opinion that part of an entire contract could not be assigned.

Unless the case can be brought within section 28, sub-sect. 6, of the Judicature Act, the plaintiff cannot succeed, the proceedings not having been brought under the equity jurisdiction of the County Court. The case was stated solely as to the effect of the sub-section.

Serjeant Molony, K.C., in reply :—

The case as stated shows clearly that we relied upon the equitable assignment as well as on section 28, sub-sect. 6, of the Judicature Act, and submits, for the opinion of this Court, the general question whether, upon the facts stated, the plaintiffs are entitled to an affirmance of the decree.

April 29.

GIBSON, J. :—

The validity of the mandate of November 9th, 1909, as an assignment, apart from its partial character, is not disputed ; all the parties interested in the debt, or in disputing the debt, are before the Court. Though the case states that the Judge dismissed Mr. Byrne, the trustee, out of the suit, the record does not show this ; such direction, if given, was erroneous, and I shall treat Mr. Byrne as party.

On the facts stated in the case, plaintiffs' counsel contend (1) that the assignment of part of a debt is within the Judicature Act, section 28, sub-section 6 ; (2) that, irrespective of that section, the plaintiffs are entitled to maintain this action in its present form on equitable principles. If in order to give relief it was necessary to change the action into an equity suit proper, this could not be done ; not only because no power of making such amendment is reserved, but because appeal jurisdiction in equity cases is subject to different conditions, and does not allow a case to be stated for this Court. The defendants, the County Council, dispute both the plaintiffs' propositions.

(1) [1899] 2 Q. B. 613, at p. 618.

On the first point—the construction of the section—there are conflicting decisions on the corresponding English enactment. On the second point the reasoning in *Brandt's Case* (1) is relied on. There are no decisions on either question in our Courts. They are both important, and I shall discuss them separately.

1. To construe the enactment, it is desirable to have before us the previous state of the law as to actions and suits.

Apart from special statutes which enabled certain assignees to sue: Addison on Contracts, ed. 1903, p. 202; debts and contracts were not at law assignable, though an action might be brought against the assignor in certain cases for acting in violation of his assignment: *Gerard* v. *Lewis* (2). The only remedy against the debtor was an action in the name of the assignor. In Common Law actions all the parties entitled to sue must be plaintiffs; the debt was entire and could not be enforced piecemeal. If a garnishee order over part of a debt was made, and liability was disputed, the question of liability for the debt as one integer was determined by a special issue.

In equity, contracts not of a personal character were assignable: *Tolhurst's Case* (3); *Kemp's Case* (4). Whether contracts were assignable or not, the debts arising thereon were capable of valid assignment or charge, wholly or in part, without any special form of notice. The cases are conveniently summarized in Leake on Contracts, Part VI, c. 1, ed. 1906. A contract as such, if assigned, as in *Tolhurst's Case* (3), must have been assigned as a whole.

Where the alleged debt was in respect of a contract enforceable at law, as, for instance, a building contract, and such debt and the due performance of the contract were in dispute or might be in dispute between the original parties, the remedy was to allow the assignee to sue in the name of his assignor. I am not aware that Equity Courts ever, by reason of assignment of a debt, affected to have jurisdiction to determine a Common Law controversy between the original parties, or to withdraw it from the Common Law Court where it was determinable by a jury. Where the debt was established or admitted, the assignor was regarded as trustee for the assignee, and whether the assignment was of

(1) [1905] A. C. 454.
(2) L. R. 2 C. P. 305.
(3) [1903] A. C. 414.
(4) [1906] 2 K. B. 604.

K. B. Div. 1912.

CONLAN v. CARLOW CO. COUNCIL.

Gibson, J.

present or future debts, was oral or in writing, with oral or written notice, was absolute or by way of charge only, the debtor, after notice, was disabled from making any payment in disregard of such assignment. The general principle is explained in *Tailby's Case* (1). In equity suits all parties interested were joined.

The object of the section was to enable the legal assignee to sue and enforce legal and all other remedies without joining the assignor, subject to certain conditions: the assignment must be absolute, in writing, of a debt or legal chose in action, and written notice is required. There is a proviso enabling interpleader proceedings to be taken if the assignment was disputed (which assumes that the assignor is not a party to the action) or if there were conflicting claims to the debt or chose in action. Did the enactment authorize the splitting up of rights to enforce a debt or contract in a manner previously unknown? Take a case: A contracts with B to build a house for him for £1000; he assigns absolutely £500 thereof to C, and gives D another assignment for £500. If B disputed due performance of the contract, is he to be sued twice over, with perhaps different results according to the view taken in each case by the jury? What is to happen if it is decided that only £500 is payable? Is D, by suing first, though his assignment is later, entitled to capture all? Is the assignor not to be a party to the action in which the debtor's liability is to be determined? These difficulties would not arise in an equity proceeding, the note of which is completeness and finality—when all parties, the assignor and the claimants to the debt, would be before the Court. The section appears intended to make debts and legal choses in action, previously in equity transferable, legally assignable so as to be recoverable without joining the assignor, subject to specific conditions. "Any debt or other legal chose in action" must be read as descriptive of the entire debt and chose in action, and not a part of them. If a contract, as a chose in action, as in *Tolhurst's Case* (2), could not be assigned otherwise than as a whole, the same construction must apply to debts. The inconvenience of the view taken by Darling, J., in *Skipper* v. *Holloway* (3), is strikingly

(1) 13 A. C. 523.
(2) [1903] A. C. 414.
(3) [1910] 2 K. B. 630.

illustrated by the result in the Court of Appeal in that case, where it was held that there was no debt in existence at all. Suppose that there had been separate assignees of distinct parts, and the assignor was not a party, conflicting decisions would have been conceivable; and the liability of the defendant on his contract would not have been determined finally and once for all by the first decision. I therefore concur in the opinion of Bray, J., in *Forster* v. *Baker* (1). In *Brice* v. *Bannister* (2), though the debt was in fact split, the point was apparently overlooked, and was not decided in the judgments. It was accordingly dealt with as open in the two recent cases.

It is clear that a case otherwise outside section 28, sub-sect. 6, cannot be brought within it by joining the assignor as defendant; the object was to get rid of that necessity. The section must be construed as intended to meet a case where the assignor is not to be a party. In *Skipper's Case* (3), the assignor was made party, but the decision was not rested on this ground, but on the construction of the section. On equitable grounds, apart from the section, *Brandt's Case* (4) might have supported the action.

2. Assuming that the special jurisdiction conferred by sect. 28, sub-sect. 6, is inapplicable, it is contended that under section 27 the action is maintainable. The debt is here established; and all the persons interested in it are parties to the action. On the principles already stated as to equity jurisdiction, it would seem that equitable relief of the character here asked would be competent and proper. The question is, can it be awarded in this form of action? Lord Macnaghten's speech in *Brandt's Case* (4), p. 461, states that it can. In *Alexander's Case* (5) effect was given to a partial assignment, though no doubt the point was not raised. Where equitable relief was given before the Judicature Act, the assignor was usually, if not invariably, a party. In a case outside section 28, sub-sect. 6, the assignor would seem in a case like the present a necessary party. His assignment makes him a quasi-trustee; and whether he has assigned absolutely or by way of charge, the execution and effect of the alleged

(1) [1910] 2 K. B. 636.
(2) 3 Q. B. D. 569.
(3) [1910] 2 K. B. 630.
(4) [1905] A. C. 454.
(5) [1903] 2 K. B. 208.

K. B. Div. 1912. CONLAN v. CARLOW Co. COUNCIL. Gibson, J.

assignment are matters on which he is entitled to be heard. Where the alleged debt is split, he has an obvious interest in establishing the debtor's liability if not admitted. In *Brandt's Case* (1), the assignor was not a party. Lord Macnaghten does not advert to this, but the only question there was as to the nature of the instrument, and there was no question of severance or liability.

On the broad question whether actions, Common Law in form, are now maintainable on equitable principles, *Langtry's Case* (2) is an important authority. It is, I believe, now settled that an ejectment by a plaintiff entitled in equity to possession against a defendant cannot be defeated by the legal estate not being in the plaintiff. *Brandt's Case* (1) is a direct opinion on the general question.

It may be inconvenient that an employer should have his contract altered by having to pay two persons instead of one, or indeed to have to pay any person outside the contract. This inconvenience is dwelt on by Bramwell, L.J., in *Brice* v. *Bannister* (3). But it is certain that the debtor cannot act in defiance of his creditor's assignment; he must give effect to it when brought to his notice; just as a mortgagor whose mortgagee has created a sub-mortgage for part of the mortgage debt must act on such sub-mortgage when he has notice of it—though he may not be a party to it.

My decision only applies to an action like this, where all the persons interested in the debt or in resisting it are parties, so that liability, if disputed, can be finally decided in the one proceeding.

The section gives a new direct remedy in a certain limited class of cases, but does not affect the previously existing right to equitable relief, which was much more extensive. That such relief can be given in a properly constituted action appears from *Brandt's Case* (1). The County Council could not in the present case have paid O'Neill in full, setting the assignment at defiance. It plainly was enforceable in some way, and the only question is as to the *form* of the proceeding. The inconvenience of having two payees is therefore, unavoidable. When the entire debt liability

(1) [1905] A. C. 454.
(2) 39 I. L. T. R. 80.
(3) 3 Q. B. D., at p. 581.

is represented in the action, as it is here, I am of opinion that the assignee of part can compel payment though the proceeding is Common Law in form.

The question reserved must be answered in the affirmative.

BOYD, J., concurred.

Solicitor for the plaintiffs: *John J. Duggan.*

Solicitor for the County Council of Carlow: *C. H. Thorp.*

J. G. T.

RURAL DISTRICT COUNCIL OF KILLARNEY, APPELLANTS; JOHN GRADY, RESPONDENT (1).

Justices—Cottier tenancy—Determination by notice to quit—Proceedings to recover possession—Demand of possession not necessary—Landlord and Tenant Law Amendment Act (Ireland), 1860 (23 & 24 Vict. c. 154), s. 86.

In proceedings before Justices under section 86 of the Landlord and Tenant Law Amendment Act (Ireland), 1860, to recover possession of a cottier tenement after the interest of the tenant has been determined by notice to quit, it is not necessary to allege in the summons, or to prove, a demand of possession by the owner or his known agent or receiver. Such demand is necessary only in respect of the second class of cases dealt with in the section, viz.: permissive occupants such as servants, herdsmen, or caretakers.

Rex (Leonard) v. *Justices of Carlow* (45 I. L. T. R. 48) not followed.

CASE STATED under 20 & 21 Vict. c. 43.

At a petty sessions held for the petty sessions district of Killarney, County Kerry, the respondent, John Grady, was charged as defendant in a summons, in which the appellants were complainants, for that he refused on demand made, and still refused, to deliver up the peaceable possession of a certain cottage and garden, containing 1A., 6P., statute measure, situate in the said petty sessions district, which he held under the

(1) Before PALLES, C.B., and KENNY and WRIGHT, JJ. The motion was partly heard on the 3rd May, when it was adjourned for the reasons mentioned in the judgment of Palles, C.B.

K. B. Div. 1912. KILLARNEY R. D. C., *Appellants*: GRADY, *Respondent.*

complainants as tenant from week to week under a cottier tenancy under the Landlord and Tenant Law Amendment Act (Ireland), 1860, by virtue of an agreement, dated the 17th April, 1911, which tenancy was determined by a notice to quit on the 24th October, 1911.

The charge was heard before the Justices at petty sessions, who ordered that it should be dismissed without prejudice, but on the requisition of the complainants stated the present case, which, after setting out the matters above mentioned, proceeded as follows:—

"At the hearing of the said complaint it was proved on the part of the said complainants (for whom Mr. David Moriarty, solicitor, appeared) that the defendant entered into a cottier tenancy agreement with complainants as tenant from week to week of a certain cottage and allotment; that said tenancy was duly determined by a notice to quit, and possession duly demanded by Mr. P. T. Lyne, collector of cottage rents for complainants; and Mr. Moriarty, for complainants, contended that in a case where a cottier tenancy was determined by notice to quit, it was not necessary that there should be a demand by complainants, or by their known agent or receiver; that such demand was rendered necessary by section 86 of the Act of 1860 only in case of permissive occupants, and that a summons in a case of a determination of a cottier tenancy was valid without a recital of a demand by complainant, or by a known agent or receiver.

"And whereas it was contended on the part of the defendant (for whom Mr. M'Cartie, solicitor, appeared) that the said summons was bad, inasmuch as it did not aver the necessary matter required to give jurisdiction; inasmuch as it did not show on its face that there had been a demand of possession, prior to the issue of the summons and subsequent to the expiration of the notice to quit, made on the part of the complainants, or their known agent or receiver, and a refusal on the part of John Grady to give up possession; and he relied on the decision of the Court of King's Bench in the case of *R.* (*Leonard*) v. *Carlow Justices* (45 I. L. T. R. 48).

"No witnesses were examined on the part of the defendant.

"And whereas upon the said hearing, we being of opinion that we were bound by the decision of Lord O'Brien in the case of *R.* (*Leonard*) v. *Carlow Justices*, viz., that the words 'on demand by complainants or their known agent or receiver' were essential to give jurisdiction, and should appear on the face of the summons, and thereupon, while not admitting that such words were necessary, Mr. Moriarty asked us to amend the summons by inserting them, we, whilst expressing no opinion as to our power to amend the summons, refused so to amend the summons.

"And hereupon the judgment of the Court is required as to whether we, the said Justices, were correct in point of law in our determination that the said summons was bad, and disclosed no jurisdiction, or as to what should be done in the premises."

Moriarty, for the appellants:—

Section 86 of the Landlord and Tenant (Ireland) Act, 1860, deals with two distinct classes of cases: first, cases, such as the present, of cottier tenancies where the interest of the tenant has ended or been duly determined by notice to quit; and secondly, cases of permissive occupants, *e.g.*, servants, herdsmen, or caretakers: *Rex.* (*Mahony*) v. *Justices of Cork County* (1). It is clear on the grammatical construction of the section that the words "on demand made by the owner thereof, or his known agent or receiver," apply only to cases coming within the second branch of the section. Section 53 of the same Act expressly provides that in an ejectment under the Act it shall not be necessary to allege or prove the making of any demand where a tenancy appears to exist between the parties. *Rex* (*Leonard*) v. *Justices of Carlow* (2) was decided on the mistaken assumption that the case was governed by *R.* (*Houlihan*) v. *Justices of King's County* (3), that being in fact a decision under the second branch of sect. 86.

Bernard Roche (with him *P. Lynch, K.C.*), for the respondent:—

The words "on demand," &c., in section 86, govern all the

(1) [1910] 2 I. R. 38, at p. 41.
(2) 45 I. L. T. R. 48.
(3) 6 I. W. L. R. 56.

K. B. Div. 1912.

KILLARNEY R. D. C., *Appellants*; GRADY, *Respondent*.

preceding part of the section and apply to both classes of cases dealt with. The punctuation shows this, a comma occurring before the words. Section 53 does not apply to proceedings under section 86. [He referred to 14 & 15 Vict. c. 92, section 15.]

PALLES, C.B.:—

When this case was opened on last Friday, it appeared that the very point in issue had been decided in *Rex* (*Leonard*) v. *Justices of Carlow* (1), a decision distinctly in favour of Mr. Roche's contention, by a Divisional Court consisting of the Lord Chief Justice and my brother Wright. According to the practice in this division we are not at liberty to act against a previous decision of a Divisional Court unless either that Court requests us to do so, or the full Court is summoned so as to give every Judge an opportunity of being present. Accordingly, I communicated with the Lord Chief Justice at the request of my brethren, and asked him to summon a full Court; referring him to the report of his judgment in the Irish Law Times Reports, and telling him that we (including Mr. Justice Wright, who was a party to the previous decision) thought that it should be re-considered, and that we thought it probably was pronounced *per incuriam*. The Chief Justice, having considered the question, said that he preferred that we should ourselves determine the case instead of reserving it for the consideration of the full Court, and accordingly we have proceeded to do so.

It is quite plain from the judgment of the Lord Chief Justice in *Leonard's Case* (1) that it was decided on the basis, urged by the learned counsel there and not adequately answered by the counsel on the other side, that it was governed by *The Queen* (*Houlihan*) v. *Justices of King's County* (2). It was pointed out, however, by Mr. Moriarty here that *Houlihan's Case* (2), although decided under the same section of the Act, arose under a different limb of that section, and that therefore the question in *Leonard's Case* (1) had not been decided in *Houlihan's Case* (2). The present case therefore is almost one of first impression.

(1) 45 I. L. T. R. 48. (2) 6 I. W. L. R. 56.

Dealing, then, with it in this sense, I come to consider the 86th section.

It includes two classes of cases. First, cases of landlord and tenant, where the interest of the tenant has either ended by the expiration of the tenancy, or has been duly determined by notice to quit. Secondly, with cases not of landlord and tenant, but of permissive occupancy, cases in which the holding is at the will of another, and where a demand is requisite to determine the right to remain in possession. Of the two classes, then, one is of persons who have no right to be there; the other of those who have a right to be there until there is a demand of possession; and the Legislature legislates in reference to the procedure for removing each of these classes from possession. It commences by defining the first class—"In case the term or interest of any tenant in any such cottier tenement shall have ended, or shall have been duly determined by a notice to quit, and such tenant or any person by whom the premises or any part of them shall be then actually occupied shall neglect or refuse to deliver up possession of the same,"—then it defines the second—"or in case any person shall have been put or shall be put into possession of any lands or premises by permission of the owner, as servant, herdsman, or caretaker, and shall refuse or omit to quit and deliver up the possession of the premises," and then the words follow: "on demand made by the owner thereof, or his known agent or receiver," it shall be lawful to issue a summons.

The question is to what part of the enactment the words "on demand made by the owner thereof, or his known agent or receiver," refer. It appears to me to be plain that they apply only to the second class of cases. In the first place, we have the old rule of construction, *ad proximum antecedens fiat relatio, nisi impediatur sententia.* The onus is thrown on the person who seeks to make the words refer to more than the last antecedent, to give them that extended construction. But here, if we were to construe these words in the way Mr. Roche suggests, the words in the earlier part of the section, "and such tenant or any person by whom the premises or any part of them shall be

K. B. Div. 1912.

KILLARNEY R. D. C., *Appellants*; GRADY, *Respondent.*

Palles, C.B.

then actually occupied, shall neglect or refuse to deliver up possession of the same," would be surplusage.

Further, the necessity for a demand arises, as I have mentioned, by reason of the position of the second class dealt with. It is necessary that there should be a demand in order to give a *right* to possession, while in the case of the first class there is not any such necessity.

Lastly, the proceeding is in relation to overholding tenants, in substance an "ejectment," and to hold a demand necessary would be contrary at least to the spirit of section 53.

Upon the whole, I am of opinion that Mr. Moriarty is right in his contention, and that the necessity for a demand does not exist under the first limb of the section, that is where there is the relation of landlord and tenant. There will not, however, be any costs, as the defendant was entitled to rely on *Leonard's Case* (1).

KENNY and WRIGHT, JJ., concurred.

Solicitor for the appellants: *D. M. Moriarty.*
Solicitor for the respondent: *M. M'Cartie.*

J. C. T.

(1) 45 I. L. T. R. 48.

SANDFORD *v.* PORTER AND WAINE.

Appeal.
1912.
June 21, 24, 29.

Solicitor and client—Implied authority to issue execution after judgment—Trial—Misdirection—R. S. C. I., 1905, Order XXXIX, R. 7—"Substantial wrong or miscarriage"—Joint tort-feasors—Verdict erroneously directed for one of several defendants—Jurisdiction to set aside on motion of co-defendant.

After judgment in an action for a money demand, the solicitor for the plaintiff has implied authority to issue execution on the judgment, without any further or express instructions from his client, who is bound by and liable for the proceeding though tortious.

A retained B as his solicitor to recover a small debt from C, a retail shopkeeper. After some negotiation and part-payment, B caused judgment to be marked for 6*d.* debt (admittedly due) and costs; and, without further instructions from A, B issued execution on the judgment, under which C's goods were seized and kept possession of by the sheriff until C paid the amount of the execution. The judgment was afterwards set aside, and C brought an action for damages against A and B. In this action the Judge at the trial, on the requisition of A's counsel, directed a verdict for him, and entered judgment in his favour with costs against C, on the ground that B's authority as his solicitor terminated with the entry of judgment in the action of A *v.* C, and that in the absence of express instructions A was not liable for the acts of B in issuing and levying execution against C; and the jury found a verdict for £175 against B, against whom judgment was entered for that amount with costs.

B moved to set aside both verdicts and judgments, on the ground of excessive damages, and of the misdirection in directing a verdict for A.

Held, by the King's Bench Division and the Court of Appeal, that B was not entitled to a new trial on the ground of excessive damages, but that there was misdirection.

Held, by the Court of Appeal, reversing the judgment of the King's Bench Division (Kenny and Wright, JJ., from whom Palles, C.B., dissented), (*a*) that the Court had jurisdiction to set aside the judgment in favour of A on B's motion, though C had remained quiescent; (*b*) that under the circumstances of the case the misdirection was capable of inflicting injustice on B, and that without speculating whether or not this in fact occurred, the case did not come within Order XXXIX, R. 7; and that the judgments in favour of A and against B should therefore both be set aside, and a new trial had of the action.

Purnell v. *Great Western Railway Co. and Harris* (1 Q. B. D. 636) followed.

Appeal. 1912.

SANDFORD v. PORTER AND WAINE.

APPEAL by the defendant, R. J. Porter, from the judgment of the King's Bench Division, dated the 16th May, 1912, refusing a motion on his behalf to set aside the verdict and judgment against him in the action, on the ground that the damages awarded were excessive, and assessed on a wrong principle, and on the ground of misdirection by the Judge at the trial, and for a new trial, and that "such judgment as may be entered against the defendant R. J. Porter may be also entered against the defendant Charles Waine," on the ground that Waine was the client and principal, and Porter the solicitor and agent, who was impliedly authorized by his retainer to do the acts complained of; the alleged misdirection being the instruction of the learned Judge to the jury that there was no such implied authority. The notice of appeal, besides seeking for a new trial, asked that the judgment directed at the trial for the defendant Waine be set aside on the ground of misdirection; and, on the further ground that if the defendant Porter was liable, the defendant Waine was jointly liable with him.

The action was brought to recover damages for illegal seizure, under a *fi. fa.* upon a judgment afterwards set aside, and £5 4*s.* paid by the defendant to the sheriff's officer to release his goods. The defences of Porter were traverses, leave and licence, and payment into Court of £5 4*s.*, in respect of the liquidated demand and £10 10*s.* in respect of the seizure. The defendant Waine delivered a separate defence, in which he denied any personal responsibility for the tortious acts complained of, and denied that Porter was retained by him as solicitor, or acted as his solicitor, or had any authority from him to do the acts complained of, which he alleged were done by Porter, not for the benefit of Waine, but for the benefit of Porter personally. Waine also paid £15 14*s.* into Court in satisfaction of the plaintiff's claim.

The plaintiff accepted the £5 4*s.*, in satisfaction of the liquidated demand, and joined issue on the defences as to the seizure.

The action was tried before Lord Justice Cherry and a special jury, at the Belfast Spring Assizes, 1912. A number

of witnesses were examined, and several documents put in evidence; but, for the purposes of this report, the substance of the material evidence may be shortly stated as follows:—

The defendant Charles Waine was a china manufacturer at Longton, Staffordshire. He had a partner in his business named John W. Holt. The plaintiff was a tradesman in a small way, who kept a shop at Portrush, where he carried on a general business, including the sale of crockery ware, such as tea-sets, muffineers, &c. Waine had in Belfast an agent named James Thompson, and in Longton a debt-collector named W. T. Lockhart. In June, 1910, the plaintiff purchased through Thompson from Waine goods to the value of £14 15*s.* 6*d.* On the first invoice there was written at foot, "Terms, net monthly," and each invoice was headed in print, "No discount allowed on overdue accounts." In January, 1911, Sandford (the plaintiff), not having paid for the goods supplied, Holt gave the debt to Lockett to collect; and Lockett, on the 19th January, 1911, wrote to the defendant, Porter, a solicitor practicising in Belfast, enclosing the invoices, and directing him to issue a writ without application. Porter, accordingly, on 25th January, 1911, served Sandford with a writ of summons at suit of Waine, for £14 15*s.* 6*d.* debt, and £1 5*s.* costs.

On the 30th January, 1911, Sandford sent to Porter a cheque for £14 15*s.* in payment of Waine's account, and of £1 5*s.*, costs. In the covering letter, Sandford stated that the way he arrived at the figures in the cheque was by deducting £1 5*s.* 6*d.*, for discount. Porter lodged the cheque on account of debt and costs, but by letter of 31st January, 1911, claimed 10*s.* more costs, inasmuch as the remittance had not been made within four days after service, and the costs of affidavits of debt and service had been incurred; and, unless same was remitted by return, threatened to mark judgment. If paid, he (Porter) would communicate with the plaintiff as to the claim to discount. On the same date Porter wrote to Lockett, to know whether the discount was to be allowed. Lockett wrote to Porter refusing to allow discount. On the other hand, Sandford in his evidence at the trial said that Thompson informed him that he was entitled to discount. On the 2nd February, 1911, Porter wrote to Sandford

Appeal. 1912.

SANDFORD *v.* PORTER AND WAINE.

that unless £1 15*s.* 6*d.* were remitted by return of post, judgment would be marked on the next Saturday, February 4th. Judgment was not, however, then marked. On the 7th February, Sandford called at Porter's office in Belfast, and had an interview with his son, George Porter, who had charge of the case, and paid him the 10*s.* extra costs. Letters were subsequently written by Thompson to Sandford advising him to pay nothing more, and assuring him that no judgment would be marked.

On the 23rd February, Porter wrote to Sandford, that it was apparent that he did not intend to pay "the balance debt." He returned the 10*s.* paid on the 7th February, and announced that he would mark judgment for the balance of the debt. He added that Thompson had told him that Sandford was not entitled to discount. A further affidavit of debt, 6*d.* in amount, was made by a son of Holt, who acted as Waine's book-keeper. Judgment was marked against Sandford, on 24th February, for 6*d.* debt and costs, and a *fi. fa.* marked to levy £5 4*s.* lodged with the sheriff, who, on 7th March, 1911, seized under it, and was paid by Sandford under protest. On the 13th March, 1911, Porter sent Lockett a cheque for £14 15*s.* 6*d.*, amount claimed by Waine for debt, and recovered.

On the 14th March, 1911, Sandford served notice of motion to set aside the judgment of 24th February, on the ground that he was entitled to the discount he had claimed, and that there was therefore nothing due at the time the judgment was marked. On the 21st April, the motion was heard by the Lord Chief Baron, and Kenny and Wright, JJ., who gave leave to amend the notice of motion by inserting therein the ground of surprise, and thereupon set aside the judgment with costs. The present action followed.

The plaintiff was examined at the trial, and detailed the facts and correspondence above outlined. He also gave evidence of special damage which it is unnecessary to set out in detail. An agent of Glass & Co., tea merchants, proved that they refused to fulfil plaintiff's orders, after the seizure. At the close of the plaintiff's case, counsel for Waine asked for a direction on two grounds—(1) that there was no evidence that Porter was solicitor for Waine, or that he was instructed by Waine to recover

the debt; (2) that there was no authority from Waine to Porter to levy execution. The Lord Justice refused to direct at that stage.

For the defendant Porter, his son George Porter was examined. He said he had no letter giving instructions to levy execution. The instructions to sue were from Lockett, but Waine was the client.

George Porter was the only witness produced on behalf of the defendant Porter.

John W. Holt (partner of Waine) was the only witness on behalf of Waine.

He said that he handed over Sandford's debt to Lockett for collection. Lockett had no authority from him to incur any liability for costs. He (Holt) did not authorize anyone to issue execution against Sandford, and he (Holt) did not hear of it until after it took place. He knew Lockett employed solicitors on his behalf. Lockett never to his knowledge collected debts by levying execution. Young Holt (witness's son) had no authority from the firm to make the affidavit of debt.

At the close of the evidence Waine's counsel again applied to have a verdict directed for him; and, as stated in the certificate, Cherry, L.J., directed a verdict for the defendant Waine, on the ground "that he did not authorize the execution, and that the defendant Robert J. Porter had no implied authority from him to levy execution," and he gave judgment for Waine with costs, and directed the £15 14s. lodged by him in Court to be refunded. His Lordship left to the jury the question of damages against the defendant Porter only; and in his charge instructed the jury that they were not entitled to award punitive damages against him, but that they were bound to award only such sum as they thought would represent the actual pecuniary loss which he had sustained through injury to his business. *D. M. Wilson, K.C.*, for the plaintiff, objected to this part of the charge, but no other objection was made. The jury asked, would an award of damages to the plaintiff relieve him from liability to pay costs to Waine? His Lordship replied that it would not, but told them that in assessing damages they were not entitled to take into consideration any liability of the plaintiff to costs in the action. The jury

K. B. Div. 1912.

SANDFORD v. PORTER AND WAINE.

found for the plaintiff for £175, and His Lordship gave judgment accordingly.

May 14, 15.

The defendant Porter, having moved the King's Bench Division for a new trial, on the grounds stated *ante*, p. 552, the Court, Kenny and Wright, JJ., *diss.* Palles, C.B., refused the motion.

The following judgments were delivered.

May 16.

WRIGHT, J. :—

The questions arising in this case are shortly as follows :—At the close of the plaintiff's case counsel, on behalf of the defendant Waine, asked for a direction on two grounds : (1) That there was no evidence that Porter was solicitor for Waine, or that he was acting on instructions of Waine in taking proceedings for the recovery of the debt ; (2) That there was no evidence of any authority from Waine to Porter to levy execution against plaintiff. The learned Judge refused at that stage to direct, but at the close of the case for the defendant Waine, he acceded to the application and directed a verdict for him, on, as I understand, the second ground. Accordingly, the case went to the jury as against the other defendant, Porter, and resulted in a verdict against him for £175, for which judgment was given. This verdict is now attacked by Porter, and a very peculiar situation results, there being two judgments, one for the plaintiff against Porter, and another in favour of Waine against the plaintiff, carrying with it a very considerable liability for costs.

The defendant Porter now seeks to set aside the verdict and judgment against him on several grounds : on the ground that the damages were excessive, and on the ground of misdirection by the learned Judge ; and impliedly he asks in his notice of motion that the judgment in favour of Waine may be set aside, since he asks that such judgment as may be entered against himself may be also entered against Waine.

I have mentioned the two grounds on which the requisition for a direction in favour of Waine was made, and it was stated to me in answer to a question I put during the argument that it was upon the second ground the learned Judge directed the verdict. As

regards the first ground, I think there was ample evidence that Porter was acting as Waine's solicitor, at all events so far as third parties were concerned. The affidavit of debt for the purpose of marking judgment was made by a son of his partner Holt.

I come to the second ground, the ground on which the verdict was directed for Waine, and, in my opinion, the learned Judge was wrong in so directing. I do not stop to consider all the authorities cited. I base my judgment on the case of *De la Pole* v. *Dick* (1), and especially the passages in the judgments of Cotton, Bowen, and Fry, L.JJ., at pp. 356 and 357 of the report; and I have come to the conclusion—and upon this point I do not think that there is any difference of opinion among the members of the Court—that the learned Lord Justice was wrong in directing a verdict for the defendant Waine.

This being so, I come to the second question: Has the other defendant, Porter, a right to come into this Court and ask that the verdict and judgment in favour of Waine may be set aside? No authority has been cited on the subject, for the reason, as I believe, that no authority can be found. The action is a peculiar one in its result. It is by one plaintiff against two defendants, and, if nothing had occurred such as occurred here, would have resulted in a joint judgment against both. One defendant was not claiming any relief by way of indemnity or contribution against the other. The plaintiff does not complain of the judgment against him in favour of Waine, or seek to set it aside. It is said that this is on account of his poverty, but that is immaterial; the fact remains that he has not applied to set it aside, and his time for doing so has now lapsed. In my opinion the other defendant cannot come into Court, and ask to stand in the plaintiff's shoes, and have this judgment set aside.

I come now to the third matter. The defendant Porter complains that the damages are excessive. I do not go into this question beyond saying that there were at all events elements before the jury on which they might find substantial damages. The amount originally due by the plaintiff to Waine was a small one, some £14, and either the whole or the bulk of it had been

(1) 29 Ch. D. 351.

K. B. Div. 1912. SANDFORD v. PORTER AND WAINE. Wright, J.

paid, and the whole or the bulk of the costs had been paid. Execution was levied for a debt of sixpence—something unique in my experience. The jury had all this before them, and another matter which might have impressed them was that this was a proceeding emanating from a debt-collecting association, which, I assume, is not very popular in Belfast. In my opinion, the jury were at liberty to give something more than mere compensatory damages, which the Lord Justice told them they were limited to.

Now comes the main question: Was the defendant Porter damnified before the jury by what occurred? I do not know whether he was or not. We might speculate as to whether this sum of £175 was not intended to represent £100 for himself, and £75 for the costs he might be obliged to pay to Waine. But this would be mere speculation. We cannot tell what will influence a jury. The withdrawing of his co-defendant may have injured Porter, or it may have benefited him. The letting of the client off, and leaving the solicitor to bear the brunt alone, might have helped Porter, or it might not, in the mind of the jury. But I am not satisfied that a substantial wrong was done to Porter, and that the jury were not at liberty to give substantial damages against him. They may have thought, though I do not say that this is so, that the real person issuing execution was Porter with a view to his own costs. At all events I do not think that there is anything to justify us in sending the case for a new trial, more particularly as I have arrived at the conclusion that the judgment entered for Waine is unassailable.

For the reason I have mentioned, I am of opinion that both the judgments should stand.

KENNY, J.:—

I concur in the judgment of my brother Wright, and for the reasons he has given. I think that both of these judgments should stand—the judgment in favour of Waine against Sandford, and the judgment in favour of Sandford against Porter.

The action has had a curious result, though the case at the trial was, in many respects, a simple one. It was an action by a man whose goods were seized in execution, brought against two

persons, Waine, the execution creditor, and Porter, his solicitor. The issuing of the writ of execution was irregular and the writ should not have been levied. There is no question as to Sandford's right of action, and if, instead of the learned Judge having directed a verdict in favour of Waine, the case had been fought out, the damages against Porter would have been, to the same extent, damages against Waine, and the case would have presented no exceptional circumstances of any sort. But, at the trial, the learned Judge was asked to direct, and did direct, a verdict with costs in favour of Waine on the ground that Porter had no authority from him to levy execution.

Four points have been argued before us, each of which has been dealt with by my brother Wright. I take them in the following order:—

1. Are the damages awarded against the defendant Porter excessive?

2. Was the Lord Justice wrong in his direction?

3. Can the defendant Porter come in here to set aside the judgment in favour of the co-defendant Waine?

4. Were the damages against Porter inflated or increased by the course which the Lord Justice took?

First, as regards the amount of the damages, I do not think that they are out of proportion to the circumstances of the case, and I do not think that any substantial wrong has been done to Porter. It was suggested that the jury, in assessing the damages at £175, took into consideration the judgment in favour of Waine as against the plaintiff, and were recouping the plaintiff for the amount of costs he would have to pay Waine. I cannot think, however, that a special jury of the City of Belfast would disregard the ruling of the Judge that they were not entitled to take this into consideration. Therefore, I am of opinion that the verdict cannot be touched on this ground.

As to the second question, I agree that we cannot go behind the case of *De La Pole* v. *Dick* (1), and the judgments of Cotton, Bowen, and Fry, L.JJ.

Thirdly, is Porter, as a co-defendant, in a position to come in

(1) 29 Ch. D. 351.

K. B. Div. 1912.

SANDFORD v. PORTER AND WAINE.

Kenny, J.

here and ask that the verdict and judgment in favour of Waine, the other defendant, may be set aside? I am of opinion that he is not entitled to do so. When the judgment is not impeached by the party affected by it, I do not think that a co-defendant can intervene, even for the purpose of putting the record right.

The remaining question is one as to which a certain amount of speculation must exist: whether or not the direction of the Lord Justice in favour of Waine, on the ground that Porter had not authority to levy execution, had an effect on the minds of the jurors so as to induce them to increase the damages against Porter. This, to my mind, is all a matter of speculation. My own opinion is that it could not have that effect. If the plaintiff had, by leave of the Judge at the trial, discontinued his action against Waine, Mr. Brown says his argument would have been the same. But, if so, he must contend that, notwithstanding such discontinuance, he would be entitled to have Waine retained as a co-defendant. I do not think that he would have any such right.

PALLES, C.B.:—

I regret that I am unable to agree with my learned colleagues. The case is peculiar in many respects, and I have never met one analogous to it.

On the first point there is no difference of opinion between us, viz., as to whether or not there was misdirection on the part of the learned Judge. We all think that we ought to act on the decision in *De la Pole* v. *Dick* (1), which is the latest case on the subject. It was a decision of Cotton, Bowen, and Fry, L.JJ., and they acted on the principle laid down by Rolle, C.J., in *Lawrence* v. *Harrison* (2), that the warrant of attorney is not determined by judgment. There appears to have been a difference of opinion or of practice at a period later than this decision, but Parke, B., in *Bevins* v. *Hulme* (3), expressed a strong opinion that the original retainer was not determined by the judgment. I think it would be wrong of us not to follow the decision of the Court of Appeal in

(1) 29 Ch. D. 351.
(2) Style, 426.
(3) 15 M. & W. 88, at p. 96.

England, as we should be bound to do were it a decision of the Court of Appeal in this country. Therefore, I agree that there was misdirection.

It is upon a much more narrow point that I have the misfortune to differ from my colleagues. There having been misdirection, what are the legislative provisions in reference to it? Attention has been directed in recent years in the House of Lords to the clause in section 48 of our Judicature Act of 1877, to which there was no equivalent in the English Judicature Act of 1873, but a similar provision is found in section 22 of the Judicature Act of 1875. The provision I refer to practically preserves the old right to a Bill of Exceptions. It enacts:—

"Provided that nothing in this Act, *or in any rule* made under its provisions, shall take away or prejudice the right of any party to any action to have questions of fact tried by a jury in such cases as he might heretofore of right have so required, nor upon any trial before a jury to have the issues for trial by jury submitted and left by the Judge to the jury before whom the same shall come for trial, *with a proper and complete direction to the jury, upon the law* and as to the evidence applicable to such issues: Provided also, that such right may be enforced by motion in the High Court of Justice, or by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record."

I am aware that there was a rule in the schedule to our Judicature Act, but a rule capable of being altered by the Judges, providing that a new trial should not be granted on ground of misdirection, unless in the opinion of the Court some substantial wrong or miscarriage had been thereby occasioned in the trial of the action. That rule was copied from the corresponding rule in the English Act of 1873 (which did not contain any provision similar to our section 48), and with which it was consequently consistent, but there is a strong body of opinion both here and in England, with which I have been in accord for a great number of years, that this rule is in the teeth of section 48 of our Act, and that the corresponding English rule is contrary to section 22 of the English Act of 1875. The Judges cannot by rules alter any of the provisions of the Judicature Acts,

K. B. Div. 1912. SANDFORD v. PORTER AND WAINE. Palles, C.B.

and were it necessary I should not have had any hesitation in acting on that opinion, and holding that a person is entitled, without more, to a new trial on the ground of substantial misdirection. I understand that in a case in the House of Lords, in which Mr. Ronan was counsel, *Smith* v. *Trimble* (1), he relied on the rule being *ultra vires*; that Lord Halsbury expressed his concurrence in this view; that he dissented from the ultimate judgment, but that that judgment was arrived at without any other of the Lords expressing an opinion upon that question. It is not, however, necessary to decide this question in the present case, to the facts of which I now proceed to advert.

At the close of the trial there was a controversy between three persons, the plaintiff and the two defendants. There was but one issue that it was right should be left to the jury, the issue as to the *joint* liability of the two defendants, and the amount of damages to be assessed *jointly* against them. We must take the case as it was then presented. We cannot know the terms in which counsel impressed on the jury the hardship the plaintiff had suffered, but I can quite understand it, and I also understand the view which a special jury of the City of Belfast might and probably would take of the case, having regard to the ruling of the Lord Justice. It might have been said that this case was one of great hardship; that a judgment had been marked for sixpence, and that practically that sixpence had been paid and had been returned by the solicitor; that practically all the costs had been paid. That the solicitor who was to receive his costs, not, it was suggested, from his own client but from Sandford, insisted, without the authority of his client, on putting the writ into the hands of the sheriff. That the plaintiff was in such a position that the fact of the bailiff going into his premises in Portrush had practically the effect of making him give up business. I can quite understand that case being pressed on the jury, and being so pressed with the object of showing that the defendant Porter did all this for the purpose of obtaining personal benefit for himself on a small sum of costs. When under these circumstances the learned Judge tells the jury that the law did not imply that Waine had

(1) Unreported.

authorized the execution, and where there was no express authority, it followed that, from beginning to end, irrespective of any irregularity, Porter acted without authority. If anything was calculated to paint Porter's character blacker than was suggested by the evidence, nothing could have been stronger than that he acted from beginning to end without authority. I cannot say that this *may not* have affected the jury in a case in which they were entitled to give exemplary damages.

Now, I cannot say that the misdirection had not the actual effect of inflicting injustice on Porter. Whether it actually did or not I cannot say, but it was reasonably capable of doing so; and the question arising on this motion is, whether in a case in which there has been a misdirection which may have prejudiced or caused injustice to one of the parties, that party is or is not entitled *as a matter of right* to have the verdict set aside.

Let me call attention to the language of Lord Halsbury in *Bray* v. *Ford* (1). As I read it, the rule he lays down is contrary to that which is now being acted on by my learned colleagues. Assuming that I am wrong as to the effect of section 48 of the Judicature Act, and that the rule that a new trial shall not be granted on the ground of misdirection, unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned in the trial, is a legal rule, how does Lord Halsbury deal with the matter? He says:—"What influence such a wrong would have had upon the verdict or upon the amount of damages, I am not disposed to consider . . . It is nothing to the purpose to say that the rest of the printed matter complained of as a libel would justify a verdict for the same amount of damages. I absolutely decline to speculate what would have been the result if the Judge had rightly directed the jury."

Each of my learned colleagues has expressed an opinion that they are unable to decide whether or not the misdirection here caused an injustice, and therefore they refuse to set aside the verdict. The difference between them and me is that I think that where there is a misdirection which may reasonably have affected the result of the case and caused substantial wrong or

(1) [1896] A. C. 44.

K. B. Div. 1912.

SANDFORD v. PORTER AND WAINE.

Palles, C.B.

miscarriage, the Court is *bound* to set aside the verdict, *unless affirmatively satisfied* that it did not; and, as I am not so satisfied, I am of opinion that both judgments in this case should be set aside, and that there should be a new trial. But as my learned colleagues differ from me, the order of the Court will, of course, be the other way.

Appeal. June 21, 24.

The defendant Porter having appealed:—

Gordon, K.C., and *Harrison, K.C.* (with them *W. H. Brown, K.C.*), for the appellant:—

The authority of the solicitor, with reference to the action, is not determined by the entry of judgment: *Laurence* v. *Harrison* (1); *De la Pole* v. *Dick* (2). There, by the order on further consideration, the defendant was ordered to pay money into Court, which he did not do, and went out of the jurisdiction. Notice of appeal to vary the order, by directing payment to the plaintiff, was served on the solicitors on record for the defendant. The object of the appeal was to put the order in a shape which would enable the plaintiff to enforce it otherwise than by sequestration, which, in the particular case, afforded no remedy. The solicitors stated that they had ceased to act for the defendant, but there had been no rule to change. The Court of Appeal held the service sufficient. There is in the report a very elaborate review of all antecedent authorities by Mr. Cecil Russell, counsel for the appellants; and Cotton, L.J., in commenting upon it when giving judgment, says, at p. 356:—"The authorities do not decide the question, whether the authority of a solicitor on the record continues as between himself and the other side, during the period through which the right of appeal exists. In the present case, however, I think it clear that the fruits of the judgment not having been obtained by the plaintiff, there still was a duty imposed on the defendant's solicitor on the record as betweeu himself and his client, so far as the client had not discharged him, and also as regards the other side, so as to make service upon him good service. The neglecting

(1) Style, 426. (2) 29 Ch. D. 351.

to change a solicitor when he ceases to act does not discharge him." That case was accepted by all the three Judges in the King's Bench Division as covering this question. A similar question had previously arisen which was argued on a special demurrer to the declaration in *Bevins* v. *Hulme* (1). That was an action by a client against his attorneys for not paying over moneys recovered for him in an action, the cause of demurrer being that it was not alleged that in receiving the money they acted on the plaintiff's retainer, and it was strongly argued by counsel for the defendant that the retainer terminated with the judgment. Parke, B., said, at p. 95, in giving judgment: — "Now what was the duty of the attorneys in that suit, arising out of their original retainer by the plaintiff? It was that, if they received the damages as attorneys in that suit under that retainer, they would pay them over, whether to the plaintiff in the present suit, or to the nominal plaintiff in that which they brought, does not appear, but to one or the other"; and, afterwards commenting on Lord Ellenborough's dictum in *Brackenbury* v. *Pell* (2), said that he (Parke, B.). thought it was right, and that the weight of authority, even at that time, was against the decision of Heath, J., in *Tipping* v. *Johnson* (3). In *James* v. *Ricknell* (4) it was held that a solicitor, after judgment, had no authority to pay money to the claimant in an interpleader action without fresh instructions from his client, but that was because the Court considered that interpleader proceedings were substantially a second action. Wills, J., admits that a solicitor who has recovered judgment may proceed to execution without further authority. In *Morris* v. *Salberg* (5) the authority of the solicitor seems to have been assumed. To the same effect is *Hewitt* v. *Spiers and Pond* (6). Lord Esher, M.R., recognizes the power of the solicitor to bind the client by endorsement of the *fi. fa.*: see Lush's Practice (ed. 1865), where the rule is clearly stated, and the authorities up to that date are collected.

There was in the Court below no difference of opinion upon

(1) 15 M. & W. 88.
(2) 12 East, 588.
(3) 2 Bos. & Pul. 357.
(4) 20 Q. B. D. 164.
(5) 22 Q. B. D. 614.
(6) 13 Times L. R. 64.

Appeal. 1912. SANDFORD v. PORTER AND WAINE.

this question; but the really important point on which that Court was unable to agree is that arising on Order XXXIX, Rule 7, corresponding to the English Order XXXIX, R. 6, which provides that a new trial shall not be granted on the ground of misdirection, unless, in the opinion of the Court, some substantial wrong or miscarriage has been thereby occasioned at the trial. A question has been raised whether, having regard to the express provisions of section 48 of the Judicature Act (Ireland), 1877, this Rule was not *ultra vires*. But passing over this, and treating the Rule as *intra vires* and valid, is this a case in which it excludes the right which antecedently existed of a party against whom a verdict is found, and where there has been misdirection, to have his true right and liability established in a new trial? The two learned Judges who constituted the majority of the Court below seem to have both considered that whether the effect of the misdirection was to increase the amount of damages against Porter was mere matter of speculation, and they speculated in effect that it did not. One of them is content with ignorance on this somewhat vital subject. We submit that the dissentient opinion of the Lord Chief Baron as to the effect of the Order is altogether right, namely, that if it be matter of speculation whether the misdirection has or has not materially affected the unsuccessful party, he is entitled *ex debito justitiae* to a new trial; and that it is only in the possibly few cases in which the Court to whom application for the new trial is made has formed the opinion, presumably on reasonable and adequate grounds, that the misdirection was innocuous, that the verdict is to stand. Doubt or speculation is not enough to deprive the party who suffers from a misdirection of his *prima facie*, natural, and appropriate remedy. This is made clear by the case of *Bray* v. *Ford* (1) in the House of Lords, referred to by the Lord Chief Baron in his judgment. There, under the English Order, the Court of Appeal had refused a new trial in a libel action on the grounds that they were uncertain whether the large damages awarded were inflated by a clear misdirection. Their judgment was reversed by the House of Lords. Lord Halsbury, L.C., says, at p. 48:—"I absolutely decline to speculate what might have

(1) [1896] A. C. 44.

been the result if the Judge had rightly directed the jury. It is enough for me that an important and serious question has been practically withdrawn from the jury, and this is, I think, a substantial wrong to the defendant."

There can be no reasonable doubt that substantial wrong was caused to the defendant Porter by the misdirection. First, it is almost certain that the damages were increased by reason of it. The mere fact that execution is wrongly levied for a trifling sum against a shopkeeper—no matter how much his own conduct may have been to blame for it—renders it hard enough to justify the solicitor concerned in it before a jury. But how much more aggravated does it become if you find that he has acted in this way without the authority of his client—that he has done so voluntarily to gain a small sum of costs for himself, and that his client is entitled to repudiate his proceeding, and does so. And when a verdict was directed for Waine, this was the way in which counsel for the plaintiff were entitled to present the case against Porter.

Secondly, as solicitor for Waine, Porter is entitled to be indemnified by him against all damages for acts properly done by him under his retainer. The irregularity (if any) in the judgment in *Waine* v. *Sandford*, and the consequent tortiousness of the execution under it, were caused by the duplicity and improper conduct of Thompson, who was Waine's agent. The plaintiff might have sued Porter alone, in which case Porter would have clearly been entitled to an indemnity from Waine. But if Porter were now to bring an action for indemnity, he would be met by the judgment exonerating Waine from all liability for Porter's acts. If there had been no misdirection, the two defendants being jointly impleaded as joint tort-feasors, the plaintiff must have either recovered damages against both, or there must have been a verdict in favour of both defendants: *Dawson* v. *M'Clelland* (1), where the construction of Order XVI, Rule 4, in connexion with this subject was fully considered and settled by the King's Bench Division and this Court.

(1) [1899] 2 I. R. 486, 494.

Appeal. 1912.

SANDFORD v. PORTER AND WAINE.

But it being practically admitted that there was a mistrial resulting in grievous wrong to the defendant Porter, it is said that this wrong is, on technical grounds, beyond any remedy. You may, say Waine's counsel, set aside the verdict and judgment against yourself, but you have no *locus standi* to touch the judgment in our favour. That can alone be attacked by the plaintiff, and he does not complain of it. Next, it was said that the notice of motion in the King's Bench Division did not expressly ask to set aside both judgments, and that the time for doing so has now lapsed. Taking the point as to the notice of motion first, the question of setting aside Waine's motion was argued without objection by both sides in the Court below, and decided—the majority being against Porter, on the ground that he could not put himself in the plaintiff's place—an *ignoratio elenchi*, as we, on behalf of Porter, never contended that he could. But we did put forward the argument that there having been a miscarriage in the trial, Porter was entitled to be put back in the position he was in when the miscarriage took place, and that could only be effected by setting aside the judgment in favour of Waine; and this view commended itself to the approval of the Lord Chief Baron, who adopted it in his dissentient judgment. Of course Porter would derive no benefit from merely setting aside the judgment against himself, because the plaintiff would go to a new trial with the estoppel existing against Porter that the execution was levied without the client's authority, or even approval, and the judgment in favour of Waine would remain to shield him from liabilty.

D. M. Wilson, K.C., and *S. C. Porter*, for the plaintiff:—

This was an action of trespass to which there could be no defence, and in which a verdict for the plaintiff was inevitable. The only question was the amount of damages. In charging the jury on the question, the Lord Justice misdirected them in stating that the jury were only bound to award such sum as represented the actual pecuniary loss which the plaintiff sustained through injury to his business. We objected to this, but the learned Lord Justice did not alter his charge; and, notwithstanding it, the

jury found the verdict which it is now sought to set aside. Our proceedings throughout were regular. We sued both principal and agent who were jointly guilty of, and responsible for, the wrongful trespass: *Fitzsimons* v. *Duncan & Kemp* (1). The discharge of Waine from the case was the act of the Court at the instance of Waine. If this was wrong, why is the plaintiff to suffer for it and to be deprived of his verdict and judgment against the remaining defendant, Porter? If the defendants Porter and Waine have rights *inter se*, the plaintiff cannot be made responsible for their adjustment. It has hardly been argued in this Court that the damages were excessive. In cases where the process of law has been abused, it is certainly within the right of a jury to give exemplary damages against the wrongdoer. Here neither the defendant Porter nor Thompson, whom he accuses at the trial of leading him astray, was produced. If mitigating circumstances existed, they were not brought before the jury. If the jury acted on the charge and measured the damages by the plaintiff's actual pecuniary loss, the discharge of Waine would be immaterial. [Counsel referred at considerable length to the evidence as to actual pecuniary loss.] The case clearly comes within Order XXXIX, Rule 7. If a new trial is directed, there must be a verdict again for the plaintiff, and it does not require much speculation to infer that the damages will be substantial.

Hanna, K.C. (with him *James Andrews*), for the defendant Waine:—

Porter's relation to Waine was not that of solicitor and client in the ordinary acceptation of those terms. Lockett was the real client: Bowstead on Agency (5th ed.), 99. In the King's Bench Division Sandford did not seek to set aside the judgment against him in favour of Waine. The course of the trial proceeded upon Porter's liability alone, and Porter cannot now, in the Court of Appeal, make a new and different case: *The Tasmania* (2); see *per* Lord Herschell, at p. 226.

(1) [1908] 2 I. R. 483, 507.

(2) 15 App. Cas. 223.

Appeal. 1912. SANDFORD v. PORTER AND WAINE.

But, even assuming that there was a misdirection, Porter cannot take advantage of it. He did not serve any notice under Order XVII, Rule 55, claiming either indemnity or contribution against Waine. Nor is Porter prejudiced by the judgment in favour of Waine. In a subsequent action for indemnity by Porter against Waine, the issue would be different and the judgment could not operate as an estoppel; or if the plaintiff's judgment be set aside, and he goes to a new trial against Porter only, Waine will be altogether out of the case, and any question as to authority will be irrelevant. Where one only of several tort-feasors is sued, the damages cannot be increased by the non-joinder of the other parties liable: *Clark* v. *Newsam* (1). As to Order XXXIX, Rule 7, see *Tait* v. *Beggs* (2), where this Court refused a new trial, though of opinion that illegal evidence had been admitted. *Bray* v. *Ford* (3) was there commented on by all the three Lords Justices who heard the case, and was distinguished. The late Lord Chancellor, at p. 536, commences his observations on *Bray* v. *Ford* (3) by saying that every case in which the protection of the General Order is sought must depend on its own facts.

Gordon, K.C., in reply:—

It is impossible to hold that Lockett, and not Waine, was Porter's client. What has occurred here has been such a miscarriage that grave injustice has been done to one of the parties to the action. There are inherent power and jurisdiction in this Court to remedy that injustice, by placing all the parties in the position they were in at the time of the miscarriage, by setting aside both verdicts and having a new trial against both defendants.

June 29.

THE LORD CHANCELLOR:—

The facts of this case appear substantially in the judgments of the Divisional Court, and I think no more than a general summary is required for the purpose of our decision. It is now

(1) 1 Ex. 131.
(2) [1905] 2 I. R. 525, 530.
(3) [1896] A. C. 44.

admitted on all sides that the miscarriage which has taken place was wholly due to the pressure put upon the learned Judge who tried the case, eventually persuading him to give the direction in favour of the defendant, Mr. Waine. The learned Judges in the Divisional Court pointed out with absolute definiteness their view on that subject, and all the learned counsel in this Court candidly admitted it. The direction made by the learned Judge at the trial was only made by him at practically the last moment, namely, immediately before the final replies of the counsel to the jury. The requisition had been made at the close of the plaintiff's case, but it was refused; and it appears that the contention in favour of Mr. Waine was supported by a statement in a legal Digest that the authority of Mr. Porter in the proceeding which led to this action was concluded on his obtaining judgment for the defendant, Mr. Waine. The direction was given later, after the case had been dealt with on the basis that both defendants stood in the same situation. The view that prevailed was, we know, inconsistent with the settled law in the matter; for we know that, in such a case, not merely was there authority for the solicitor, Mr. Porter, to place the *fi fa.* issued on the judgment he had obtained in the hands of the sheriff, but he was under the definite obligation to take the necessary steps to enforce the execution. The result of the course taken at the instance and on the responsibility of Mr. Waine's representatives changed the whole nature and character of the trial. It placed Mr. Porter in a humiliating position; and, instead of the case being one in which the two defendants were being proceeded against for the result of a mistake, Mr. Porter was suddenly placed in the predicament of having acted, as it was supposed, without the authority or knowledge of his client, and, we cannot but infer, merely for his own purposes. I cannot imagine a more grievous plight for a solicitor to be placed in. It was the very contrary of the facts—and I fully concur with the Lord Chief Baron, that the misdirection leading to that position was in itself such a substantial wrong to Mr. Porter as entitled Mr. Porter to have the judgment against him set aside and a new trial directed. The counsel for Mr. Porter, having addressed the jury after the

Appeal. 1912.

SANDFORD *v.* PORTER AND WAINE.

The Lord Chancellor.

evidence had closed and the judgment had been entered for Mr. Waine, was in the ordinary procedure followed by the final reply of the plaintiff's counsel; and it is certainly not difficult to infer the advantage he took of the fresh position that had arisen, where the whole blame was, no doubt, placed upon the unauthorized, illegal, selfish act of the grasping solicitor. In the circumstances the verdict of £175 could not have been a surprise. The whole nature of the action had been transformed by the unwarranted contention on the part of Mr. Waine, and I do not think it necessary to go further with that subject. It is impossible, in my judgment, not to consider that there was a grave miscarriage of justice, and that a substantial wrong was done to the appellant. I need not dwell on the exact character of the proceedings taken by Mr. Porter, before the Divisional Court, to have the judgment against him set aside, and a new trial directed, and to have an order made against Mr. Waine, setting aside the judgment obtained by him. In the result, however, it is certain that the discussion took the form of an argument in favour of a general new trial being directed against both defendants. Two of the learned Judges refused the application, for the reasons appearing in their judgments; but the Lord Chief Baron, who said that in his experience—great, as we know it is—he had never seen a case analogous to the present, declared himself in favour of both judgments being set aside, and that a new trial be directed against both defendants. The appellant then brought the case to this Court on a specific appeal directed to the plaintiff and the co-defendant, asking for an order setting aside both judgments, and directing a general new trial against both defendants. It is a notable feature in the case that the plaintiff never moved to challenge the judgment with the order for costs, obtained by Mr. Waine against him under the conditions mentioned. But before this Court now Mr. Waine is represented, as the result of a notice sufficient and regular on the part of the appellant.

We come at once to the important question for decision in the case. It is said by the learned counsel for Mr. Waine, that no jurisdiction exists in the Court to yield to the application for a new trial against Mr. Waine as well as against Mr. Porter.

Appeal.
1912.
SANDFORD
v.
PORTER AND
WAINE.
The Lord Chancellor.

The objection is based on the fact that there is no motion in the matter on the part of the plaintiff, and that it is out of the question for the Court to entertain that part of the appeal, because of the settled law that no contribution exists amongst joint tort-feasors. That, however, I think, is a misconception of the situation, as it is viewed by the Court. We do not look upon it as an attempt to obtain in this action any order for contribution or indemnity by one defendant from his co-defendant. For no such proceeding is open in the present action. We have come to the conclusion that the real and natural purpose of the appeal, and one wholly consistent with the justice of the case, is, that if the last trial was a miscarriage through the act of Mr. Waine, the new trial should take its place as it originally stood, with the original claim restored. That is a very different position from that which would exist if Mr. Porter be left as the sole defendant in a litigation in which the co-defendant is equally liable with him. There he would, in all likelihood, be treated not as the solicitor of a client through whose agent, other than Mr. Porter, or some one recognized as such, a mistake was made, but as a man with so little sense of his duty and responsibility that, for the sake of a wretched gain, he made the adventure of an illegal execution.

The important question has to be decided, whether or not the Court has the jurisdiction to make the comprehensive order, which may be considered by it necessary to meet the justice of the case. That, evidently, is a subject of high importance affecting the public interests. In other words, is there to be no real redress in a case like the present, when a man is to be exposed to a new trial, under conditions fundamentally altering the character of the original claim made against him, and all as the result of an admitted misdirection at the trial, founded on the unjustifiable contention of his co-defendant? Has the Court no power, for want of jurisdiction, to make an order to redeem a situation of that character, for which Mr. Porter absolutely, or the plaintiff (so far as the trial was concerned), has no responsibility? I have examined the subject with all the care I could, and I have come to the conclusion that the jurisdiction does exist; and taking the general view of the case indicated by the appellant's counsel, I think it is one in which the jurisdiction ought to be

Appeal. 1912. SANDFORD v. PORTER AND WAINE. The Lord Chancellor.

exercised. Prior to the Judicature Act, 1877, the general, if not the absolute uniform practice of the Court, was, when ordering a new trial in the case of an action for a joint tort, to direct a general trial against all the original defendants. I do not dispute that under the Judicature Act and the Orders and Rules thereunder, there is no need to insist, in all instances, on a practice so rigid as that; and in a case where a defendant in an action for a joint tort is fully and fairly exonerated, I see no necessity in such a case for setting aside a judgment in his favour, on the application for a new trial by an unsuccessful defendant. But if the Court, in a case like the present, realizes that the miscarriage is due wholly to an erroneous contention persevered in by one joint defendant, in an action for a joint tort by two defendants, must it be said that the Court is powerless to deal with a situation so unjust as the present? As I have said, prior to the Judicature Act, 1877, no such view would be entertained. It never was the intention of that Act to limit the ancient rights of the Court, unless specifically provided for, and I think that it is unquestionable that the jurisdiction now challenged does exist. There is a case that has since come to our light, which, I think, is in principle an absolute decision upon the subject by the English Court of Appeal, and establishes the existence of the jurisdiction. It is the case of *Purnell* v. *The Great Western Railway Company and Harris* (1). It was an action of negligence, and the question involved was, whether the persons guilty of the alleged negligence were servants of the railway company or of the other defendant, Harris. The jury found against the railway company, and in favour of Harris. The plaintiff, just as in the present case, took no action in the matter, and, further, as here, one defendant, the railway company, appealed, without in the first instance giving notice of appeal to the successful defendant, Harris. On hearing the arguments, the Court of Appeal were of opinion that there was a grave question, whether the persons guilty of the negligence were not the servants of Harris; and, as he was directly interested, ordered that the case should stand over, and that Harris should be served with notice of appeal. I think it will be seen from the

(1) 1 Q. B. D. 636.

judgment that the notice of the fact of the appeal taken was there served by the railway company on Harris; and that, as in this case, at no stage, so far as I understand, did the plaintiff do so. When Harris' counsel appeared, the objection was made that the Court had no jurisdiction to call upon him to show cause why a new trial should not take place as to him. The whole question of jurisdiction was raised in the Court of Appeal, as here, and, in substance, it is plain that the same line of argument was adopted. Harris had to his advantage even the finding of a jury in his favour on a question of fact; while in the present instance the whole miscarriage resulted from the misdirection due to the unfounded legal plea of the successful defendant. That plea violates the absolutely settled law. We know, also, that here the defendant, Mr. Porter, took the proper course, and at his own risk served the notice of appeal on Mr. Waine. Jessel, M.R., gave the opening judgment in *Purnell's Case* (1). He reviewed the general facts of the proceedings, and then called attention to the protest made by Harris, and his insistance that the Court of Appeal had no jurisdiction to make the order as to him; but the Master of the Rolls stated :—"I myself have no doubt as to the jurisdiction of the Court. I think it is given in the plainest possible terms. But, before considering what the jurisdiction is, it is necessary to consider what the practice at common law was before the Judicature Act." He then referred to the practice that where a verdict had been found in favour of one defendant and against another, and the unsuccessful defendant moved for a new trial, he was actually bound to serve a notice of the rule for the new trial on the defendant in whose favour the verdict was returned, and no new trial could be granted unless that proceeding was adopted. "That being so in the present case," he said, "it appears to me the railway company did all they could reasonably be expected to do. . . . The only point now to be considered is, whether Harris being present, a new trial should be granted." That is the very question here, but in that case the railway company did not take, as it should apparently have done, the course the defendant, Mr. Porter, did take here on his own initiative.

(1) 1 Q. B. D. 636.

Appeal. 1912.

SANDFORD *v.* PORTER AND WAINE.

The Lord Chancellor.

"It is quite true," said the Master of the Rolls, "that there is no appeal by the plaintiff, nor is there any cross-order moved for"; and having referred to the fact that the plaintiff did not anticipate the moving of the Court for a new trial by the defeated defendant, by moving for a cross-order against the successful defendant, he added—"But under the old practice the defendant, who moved the rule, was bound to serve notice of it on the other defendant. Therefore, as the plaintiff did not desire a new trial, and in the event of the defendant, who should move for an order, obtaining one, the Court had full power to grant a new trial generally." The Master of the Rolls then asked what were then the powers of the Court of Appeal? He discussed the Order LVIII, corresponding precisely with our Order LVIII, and while this rule in the year 1876 was numbered 5, it is precisely the same, no doubt, as their present rule numbered 4, which is also our number. He said—"Larger words, I think, could not be inserted"; and, finally, he decided that, "I think it is quite clear that the principles upon which justice ought to be administered manifestly call upon us to pursue the same course." He meant that the Court below, on the assumption that Harris was *prima facie* liable, and the railway company was not, should have granted a new trial, having heard Harris first. And the Court, holding that they had jurisdiction on the merits, made the order absolute generally for a new trial. That, too, was the case of an action for tort; and the order was made, notwithstanding the fact that the jury had to determine the issue, which defendant was really liable, by the question, whose servants were the persons responsible for the injury? Surveying the whole situation, and in virtue of the ancient Common Law and the powers given by Order LVIII, precisely as given to this Court—the Court having the parties all before them, as we have all the parties here before us, came to the conclusion that there was no limitation whatever of the powers of the Court. Though the application was only made by the defeated defendant, the Court, believing that the interests of justice required it, directed the holding of a new trial against both defendants. The principle of the case appears decisive in this appeal; for here, assuming that there is liability on the part of Mr. Porter, there is unquestionable liability as well on the part of Mr. Waine. The action having been begun as a

joint action against the two defendants, I have come to the conclusion that if there be, as there ought to be, a new trial, it ought to be a general trial against the two defendants, if justice has to have the likelihood of being rendered. Otherwise we must realize that there would be a plain danger of unfair and uncalled-for blame being placed upon Mr. Porter, and all as the result of the unauthorized course taken by Mr. Waine, in pressing on the learned Judge at the trial what has turned out to be an untenable version of the law. In that situation I think this Court has the jurisdiction under Order LVIII, Rule 4, and under Order XXXIX, Rule 7, to set aside both judgments, and to declare that, if there is to be a new trial, it should be against both defendants. On the full view of the case we propose to make an order to that effect.

We have carefully considered the order which we ought to make regarding the costs, and we have decided as follows:—Mr. Porter's costs of the last trial and of the proceedings since in the King's Bench Division and in this Court should be paid by the defendant, Mr. Waine; the plaintiff shall, in no event, obtain the costs in the King's Bench Division or in this Court, but shall have his other costs as costs in the action; and that, finally, Mr. Waine's costs at the first trial must, in all events, be borne by himself, and so also his costs in the King's Bench Division and in this appeal.

THE MASTER OF THE ROLLS:—

This, as we must now hold, was a misdirection. It was a misdirection on an important and material point. Its immediate effect was the entry of a verdict for Waine, leaving Porter as the sole defendant, and the sole object of attack by the plaintiff. The amount of damages awarded is at least proof that full advantage of the altered situation was taken. It is not necessary, however, to inquire whether the misdirection complained of did in fact prejudice the defendant Porter in the eyes of the jury, or had any material effect upon them, when measuring damages. It is not for us to speculate. It only concerns us to know that such may have been and probably was the result,

Appeal. 1912. SANDFORD v. PORTER AND WAINE. The Master of the Rolls.

and, arriving at that conclusion, we are bound on the authorities as they now stand to direct a new trial. We have first to consider what was the effect, or, more properly, what may have been the effect, of the direction of the learned Judge at the trial, made at the instance of the defendant Waine, that the authority of his co-defendant, Porter, a solicitor who had been instructed by Waine to recover a debt, was determined by the recovery of the judgment.

I am, therefore, of opinion that the verdict against Porter ought to be set aside.

But then what about the verdict entered up in favour of the defendant Waine? The plaintiff has not moved to set aside that verdict. This is not the result of any oversight or lapse. It is plainly the deliberate and considered omission of the plaintiff. Is not the defendant Waine then entitled to hold his judgment? Has he not a vested right against Sandford? Has the defendant Porter, a third party, a right to intervene between a judgment creditor and a judgment debtor, to deprive the former of an advantage which his judgment gives him, and to give to the latter a relief which he has not sought and does not seek?

These considerations presented very great difficulties to my mind in the way of disturbing the verdict in favour of Waine, at the instance of Porter, his co-defendant, and they might have prevailed, were it not that I had to consider what would be the logical result of allowing the verdict in favour of Waine to stand. If he retains his verdict and judgment, he must retain his costs, and no costs can be given against him. He must leave Court triumphant on all points, having mulcted the plaintiff in costs and put his co-defendant to the costs of a new trial. In other words, the party who has caused all the trouble, who is wholly responsible for the miscarriage (because it was he who called for the direction now held to be erroneous), must depart carrying away a complete victory, while Porter, who was in no way responsible, is to be left behind with the full weight on his shoulders of an abortive trial.

If such is the necessary result, this Court is unable to prevent injustice being done. I feel unable to admit any such humiliating

conclusion. I hold that the justice of this case is, that the defendant Waine, who wrongfully obtained a verdict at the trial, and was the sole author of a miscarriage of justice to the serious prejudice of both plaintiff and his co-defendant, should be remitted with them to the same position in which they were originally placed. In other words, both verdicts should be set aside, and there should be a new trial as between the plaintiff and both defendants. This is the conclusion which I arrived at, without the aid of any judicial decision, and I am glad to find that it is supported by the judgment of the Queen's Bench Division in *Purnell* v. *The Great Western Railway Co.* (1).

Once the verdict in favour of Waine is set aside, there is no difficulty in doing full justice as between all the parties. I concur in all respects with the judgment of the Lord Chancellor.

HOLMES, L.J.:—

When this appeal was opened it appeared to me that the questions for decision were clear and free from complication. There was no controversy of fact, and the result depended on two simple matters of law.

In January, 1911, the defendant Waine, an English manufacturer, retained Porter, a Belfast solicitor, to sue the plaintiff, a Portrush shopkeeper, for the sum of £14 15*s.* 6*d.*, the price of goods supplied to him early in the previous year.

Although the retainer was received through Lockett, a debt-collector, it is not disputed that he had authority to employ Porter as the solicitor of Waine, and to correspond with him in relation to the business as Waine's agent. Accordingly, Porter, having been directed to issue a writ without previous application, did so, and had it served on Sandford on the 24th January. There are several indications that Sandford was in poor circumstances; but I think that he was anxious to pay his debts, and on the 30th January he sent to Porter his cheque for £14 15*s.*, claiming that he was entitled to £1 5*s.* 6*d.* discount. If he was entitled to this discount, the cheque would only have been short by sixpence of the sum due for the debt as well as for the costs endorsed on

(1) 1 Q. B. D. 636.

Appeal. 1912.

SANDFORD v. PORTER AND WAINE.

Holmes, L.J.

the writ. In consequence, however, of the money not having been sent within four days after service, Porter had become entitled to 15*s.* additional costs, which Sandford paid him, and there only remained the question of discount, as to which Porter said he would communicate with his clients.

This he did through Lockett, and he was informed that the debtor was entitled to no discount. Acting on and pursuant to this information he procured an affidavit of debt from Waine's bookkeeper, for the purpose of marking judgment; but he did not do so without repeated warnings to Sandford.

It is unnecessary to go through the correspondence between Porter and Sandford on this subject. The latter still claimed the allowance for discount. The former told him again and again that if he did not pay the small balance, judgment would be marked, execution issued, and his goods seized by the sheriff therefor. The seizure took place on the 7th March, when the bailiff seems to have acted with due consideration. He asked for payment of £5 4*s.*, the sum then due on the judgment, and, waving his hand, he said everything in the shop was under seizure. Sandford had not the money at the moment, but, going out to borrow it from a friend, he returned in the course of an hour and paid it under protest.

The sole cause of the litigation which began immediately after, and which seems still far from ending, was whether Sandford was entitled to be allowed £1 5*s.* for discount.

There is no doubt that Porter was told by his client that he was not, and that the client, whose invoices accompanying the goods informed the purchaser that the full price was payable at the end of a month, believed he was not.

On the other hand, I think Sandford had some reason to insist on his claim. The goods were sold to him by Thompson, an agent of Waine in Belfast, and he actually sent a blank cheque to this man to fill up and give to Porter, if he thought he was not entitled to the discount; but Thompson replied that he had paid enough, and to pay no more. Thompson's letters are curious documents. His object seems to have been to apply the blank cheque to payment of some other debt, and he certainly wrote to Sandford on the 23rd February not to pay another penny, adding that judg-

ment would not be marked, and conveying that he would be quite safe for at least a fortnight. As far as I can see Thompson had no authority to write this letter; and as a matter of fact judgment was marked on the following day, although the seizure did not take place until ten days later.

Soon after the seizure Sandford took steps to have the judgment set aside, in which he was successful on the ground of surprise, meaning, I presume, that Sandford was led by the assurances of Thompson not to defend the action. We have been told that the Court in making the order observed that Porter had acted in perfect good faith; and even if this was not said, I have not seen anything in the evidence or correspondence to indicate the least impropriety on his part.

The next step was the bringing of the present action against Porter and Waine. It might have been brought against either or both; but however it was framed, it is now admitted that there was no defence. The case presents a typical example of joint *tort-feasors*. For every act injurious to the plaintiff the two were equally liable, the one as principal and the other as agent; and the jurors in assessing damages would not be embarrassed, as they sometimes are in this class of case, by being obliged to make both answerable in the same amount, although they might think that their misconduct differed greatly in degree.

At the conclusion of the plaintiff's case, Waine's counsel asked for a direction on behalf of his client on two grounds: (1) that there was no evidence that Porter was solicitor for Waine, and (2) that there was no evidence of any authority from Waine to Porter to levy execution. This was refused at that stage, but when all the evidence closed, the learned judge directed a verdict for Waine on the ground that there was no evidence of any express authority from Waine to Porter to issue the writ of *fieri facias*, and that the latter had no implied authority to do so.

It is unnecessary for me to discuss this direction. Not only have the three judges of the Divisional Court held that it was erroneous, but Mr. Hanna in his able argument here has definitely admitted that it cannot be supported. Were it not for this ruling, the damages—the only matter to be decided—would have been assessed against both defendants on the basis that they were

Appeal.
1912.
SANDFORD
v.
PORTER AND
WAINE.
Holmes, L.J.

equally liable therefor; and I think I may add that it was not a case in which a jury would have been disposed to give what are sometimes called punitive, but what are better described as exemplary, damages. My reason for saying so is that the wrong complained of arose at most from an innocent mistake.

A verdict of £175 having been found against Porter, and judgment given for that sum, he applied to the Divisional Court for a new trial, on the ground that the misdirection I have mentioned prejudiced or was calculated to prejudice seriously his position, and to increase unjustly the damages against him. I confess that this proposition seems to me to be absolutely clear. I cannot conceive a stronger reason for giving heavy damages against a solicitor for an illegal act done by him than that while purporting in doing it to act for a client, he had no such authority, but was solely influenced by a desire to further his own interest and to secure some benefit for himself. This would be the reasonable effect upon the minds of the jury on hearing the Judge rule that Porter alone was responsible for the cause of action.

That they were thus impressed is shown by the fact that after some consideration they returned to Court to ask the Judge would an award of damages against Porter relieve Sandford from liability to pay Waine's costs—a liability which was the necessary consequence of the direction. They were told that it would not, but that they were not entitled to take this into consideration in assessing damages. The learned Judge seems also to have said in his charge that they were not entitled to award punitive damages against him, but only such sum as they thought would represent the actual pecuniary loss Sandford had sustained through injury to his business. This was admittedly a misdirection, but it was not acted on by the jury, who assessed the damages at a sum far in excess of any evidence of pecuniary loss.

Beyond the sum of £5 4*s.* paid to the Sheriff's officer I find little or no real evidence of pecuniary loss. No special damage is averred in the statement of claim. The costs of setting aside the judgment had already been given against Waine. Before the seizure Sandford was about to sell his business, and he afterwards sold it to Patterson for £275, the price of the stock, without anything for good-will, for which on some previous occasion he had

been offered £125. He does not, however, say that the sum realized was affected by the seizure, nor can I see how it could have been, and he did not call Patterson as a witness. He said he was refused credit, and customers fell off; but he gave no particulars nor called any witnesses in reference thereto.

Palles, C.B., with whose judgment I entirely agree, was of opinion that the misdirection was capable of inflicting injustice on Porter, and held on the authority of *Bray* v. *Ford* (1) that this was sufficient to entitle him to have the verdict set aside. His two colleagues stated that they were unable to decide whether the misdirection had caused injustice or not; and if there had been no other question, I presume they would have followed the decision of the House of Lords. But I gather from their judgments that their conclusion rested on a different ground. This is put very clearly by Kenny, J. He says: "Is Porter as a co-defendant in a position to ask that the verdict and judgment in favour of Waine be set aside? I am of opinion that he is not so entitled. When the judgment is not impeached by the party affected by it, I do not think that a co-defendant can intervene even for the purpose of putting the record right."

Wright, J., takes the same view. He says that "the plaintiff does not complain of the judgment against him in favour of Waine. In my opinion the other defendant cannot come into Court and ask to stand in the plaintiff's shoes and have his judgment set aside." We have thus a clear and logical issue raised. The plaintiff although at the trial he struggled against the direction in favour of Waine, is now neutral for reasons which have not been explained, but which I can guess. I understand the proposition that when the person directly interested and affected by the judgment does not impeach it, a co-defendant whose interest is uncertain and collateral ought not to be allowed to do so. I take, however, a different view, for the reasons given by Palles, C.B. I have already stated the way in which Porter was or at least may have been prejudiced by the misdirection, and the only person responsible for such prejudice was Waine.

The admitted mistrial was caused by him alone. How, then,

(1) [1896] A. C. 44.

Appeal. 1912. SANDFORD v. PORTER AND WAINE. Holmes, L.J.

can he object to the setting aside of a judgment which he ought never to have obtained, because another party injured by it is willing to bear the injury? It is right to say that the proposition I am meeting, although relied on by Kenny and Wright, JJ., was not seriously argued in this Court by the able counsel who represented either Sandford or Waine.

There is one obvious ground for their not having done so. If the mistake can be cured at all, it can only be cured by setting aside Waine's judgment as well as Sandford's. If the former stands and the latter is set aside, no advantage could result to any party. Porter at the new trial would be even in a worse position than he was at the last.

The Judge, in the face of the record to the contrary, could not tell the jury that Porter was acting as solicitor for Waine. Porter could not even give, as he did on the last occasion, evidence by letters and otherwise that he was carrying out the directions of his client, as the judgment for Waine would render such evidence irrelevant and therefore illegal.

Let me test the question I am dealing with by a matter always of importance in litigation—the incidence of costs.

If the majority of the Divisional Court was right, the costs of all the litigation rightly fall on Porter. If Palles, C.B., was right and both judgments are set aside, the proper rule as to costs would be to order the payment of Porter's costs of both the last trial, the new trial motion, and the appeal by Waine (which could not be done if Waine's judgment stood), leaving the plaintiff to bear his own costs of the new trial motion and appeal, and making all his other costs costs in the action. But if the plaintiff's judgment alone be set aside, Porter ought to bear all the costs hitherto incurred by him, and pay Waine's costs of the new trial motion and appeal, as Waine has been completely successful therein. Porter in no case could have any costs against Sandford, who was in no respect responsible for the mistrial.

I have now only to deal in a few words with the two arguments relied on by Mr. Hanna, Waine's counsel, against setting aside his client's verdict and judgment. He says that it was not asked for in the notice of motion for a new trial. I think he is wrong in this. The notice asks (*a*) that the verdict and

judgment against Porter be set aside, (*b*) that a new trial of the action be ordered, and (*c*) that any judgment obtained by Sandford therein be entered against both Waine and Porter.

Although clumsily expressed, this can only mean a new trial of the action as against both, and applies to the setting aside of Waine's judgment. Moreover, I find that the notice was so understood and discussed in the Divisional Court.

His only other point is that the order of the Judge at the trial to extend the time to apply for a new trial was confined to the plaintiff's judgment, and that the notice to his client was served two or three days late. I do not read the order as being thus confined, and I have the authority of Cherry, L.J., for saying that it was not so intended by him.

I, therefore, am of opinion that both the verdict and judgment for Waine, as well as the verdict and judgment against Porter, be set aside with the result as to costs which I have already stated.

The foregoing was written by me before the Lord Chancellor referred me to the case of *Purnell* v. *The Great Western Railway Company* (1), and I am glad that my view of the law is confirmed by such a high authority (2).

Solicitor for the plaintiff: *William Lewis.*
Solicitor for the defendant Porter: *G. M. Porter.*
Solicitors for the defendant Waine: *Fry & Son.*

W. G.

(1) 1 Q. B. D. 636.

(2) The action was tried at the Belfast Summer Assizes, 1912, and resulted in a verdict for £140 against both defendants jointly.

Appeal.
1912.
June 10, 11, 24.

TIPPERARY CO-OPERATIVE CREAMERY SOCIETY, LIMITED *v.* HANLEY (1).

Creamery Society registered under the Industrial and Provident Societies Act, 1893—Rules—Imposition of penalties—Ambiguity—Unreasonableness—Illegal restraint of trade.

One of the rules of a limited Co-operative Creamery Society duly registered under the Industrial and Provident Societies Act, 1893, provided that any milk-supplying member should, so long as he remained a member of the Society, deliver to the Society's Creamery on every working day all the milk produced from his cows (except such as might be required for use in his household), and in accordance with the regulations laid down by the committee for the delivery of milk; and that any member failing to do so should pay to the Society as liquidated damages one shilling per cow per day for every cow's milk not so delivered.

The rules did not provide for the voluntary withdrawal of a member from the society except by transfer of his shares, to which the consent of the committee was necessary, and they did not contain any definition of "milk-supplying member."

Held, by the Court of Appeal, reversing the judgment of the King's Bench Division, that the rule requiring delivery of milk as above stated was void as an illegal restraint of trade.

Held also, by Cherry, L.J., that it was too ambiguous to justify the award of penalties.

APPEAL from the judgment of the King's Bench Division, on a case stated by Lord O'Brien, L.C.J., at the hearing by him of a civil-bill appeal from the dismiss of His Honour Judge Moore, reversing the dismiss, and holding that the plaintiffs were entitled to a decree for £25. This sum was claimed in the civil bill for the defendant's non-compliance with Rule No. 5 *a* of the plaintiffs, who were a society duly registered under the Industrial and Provident Societies Act, 1893. The defendant was a member

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

of the society, being the owner of thirty shares of £1 each. He never supplied any milk to the society, and there was no dispute as to the amount of the decree if he were liable, the whole question in controversy being as to the validity of Rule 5*a*, taken in connexion with some of the other rules and the Act of 1893, under which the society was registered.

Rule 1 (the definition clause) defined (*c*) "member" as "an individual or society holding the shares required by the rule, and duly admitted to membership; (*i*) "special members" as "those persons who signed the application for registration." There was no definition of "milk-supplying member."

Rule 4 stated the object of the society to be to develop and improve dairying in Ireland by carrying on the manufacture of butter, cheese, and other milk products; the sale of dairy, farm, and garden produce; and supplying members with all kinds of agricultural requisites.

Rule 5 provided that the society should consist of special members; such persons resident in certain specified townlands; and such societies as the special members should, in the first instance, and afterwards the committee should, admit to membership. This rule concluded with the following clause:—"Every person, other than a member who has supplied milk to the society's creamery for one year, shall apply for such number of shares as are required to be held by members, and the committee shall thereupon allot the shares so applied for.

Rule 5*a* was as follows:—"The society shall, so long as its creamery may continue at work, with the exception hereinafter mentioned in this rule, accept from each milk-supplying member, and make payment therefor at the rate fixed by the committee for the time being, all the milk produced from the said member's cows and delivered to the society's creamery in good condition, and at such times as the committee may appoint, and the society, if it fails to do so, shall pay to such member (as liquidated damages, and not as a penalty) the sum of one shilling per cow per day for every cow's milk not accepted. And each milk-supplying member shall, so long as he remains a member of the society, deliver to the society's creamery on every working day all the milk produced from his cows (except such as may be required for use in his own

Appeal. 1912.

TIPPERARY CREAMERY SOCIETY v. HANLEY.

household), and in accordance with the regulations laid down by the committee from time to time for the delivery of milk, and any member who shall fail to do so shall pay to the society (as liquidated damages and not as a penalty) the sum of one shilling per cow per day for every cow's milk not so delivered: Provided, however, that the society and the milk-supplying members shall be absolved from the obligations imposed by this rule in the event of cessation of work at the creamery, owing to accident or other cause, or to the prevalence of any disorder infectious to man or beast, whereof notice has been given by the local sanitary authority.

"*Exception.*—Instead of enforcing the penalty in default of supplying milk, the committee shall have the power to refuse to purchase the milk of any member who may, at any time subsequent to the commencement of business under the provisions of Rule 4, supply milk to any creamery other than that or those owned by the society, without the permission in writing of said committee."

The rules contained provisions in the event of the insanity and bankruptcy of members, and for their expulsion if guilty of conduct detrimental to the society.

Rule 27 provided that transfers of ordinary shares might only be made with the consent of the committee. No other method was provided by the rules for the withdrawal from membership and its consequent liabilities during the member's lifetime.

Serjeant Moriarty, K.C., Corvan, K.C., and *J. P. Kenny,* for the appellant:—

Rule *5a,* on which the prosecution is altogether founded, is bad on three grounds. First, it is uncertain. Secondly, it is unintelligible. Thirdly, it has no limit as to time or distance. The rules purport to be made under 56 & 57 Vict. c. 39 (Industrial and Provident Societies Act, 1893), section 10. That section enacts that such rules shall contain provisions in respect of the several matters mentioned in the second schedule to the Act. The second schedule, which is entitled "Matters to be provided for by the rules of societies registered under this Act," specifically enumerates, *inter alia,* at paragraph 9, "Determination whether and how members may withdraw from the society." In *Murray*

v. *Scott* (1), which was a case arising as to rules of a benefit building society, made under 6 & 7 Wm. 4, c. 32, Lord Selborne, at p. 538, considers very fully the powers of a rule-making authority and the limitations of those powers. They must be (1) wholesome rules and regulations for the government and guidance of the society; (2) not repugnant to any express provisions of the Act; and (3) not repugnant to the general laws of the realm. Similar provisions as to making rules are to be found in Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 14; schedule I, 1876 (39 & 40 Vict. c. 22), s. 14. See Hardcastle on Statutes (2nd ed.), p. 292, as to by-laws in restraint of trade; *Slattery* v. *Naylor* (2) (judgment of Lord Hobhouse); *Swaine* v. *Wilson* (3); *Gozney* v. *Bristol Trade and Provident Society* (4); *Russell* v. *Amalgamated Society of Carpenters and Joiners* (5); *Nordenfeldt* v. *Maxim Nordenfeldt Co.* (6).

S. L. Brown, K.C., Carrigan, K.C., and *Sealy*, for the respondents:—

A rule, compelling members to supply milk, is of vital importance to a Creamery Society, the society agreeing to accept the milk supplied. In the absence of such a rule the creamery could not reckon on having the material necessary to carry on its operations. The rule is mutually beneficial, for while the creamery has an assured supply; each milk-supplying member has an equally assured market. In a case like this, there can be no question raised as to the reasonableness of the rules. This is a matter of voluntary contract. No one is compelled to become a member of the society; but if he does so, he knows that there are rules which will become binding on him, and he can read them before he becomes a member (7). By-laws, on the other hand, are imposed upon, and, if lawful, become binding on the persons thereby affected, without any consent on their part. Hence it is that by-laws must be reasonable. This is really the case of a partnership contract. If this be the true position, there is nothing in the

(1) 9 App. Cas. 519.
(2) 13 App. Cas. 446, at p. 452.
(3) 24 Q. B. D. 252.
(4) [1909] 1 K. B. 901.
(5) [1910] 1 K. B. 506.
(6) [1904] A. C. 535.
(7) 56 & 57 Vict. c. 39, s. 22.

Appeal. 1912.

TIPPERARY CREAMERY SOCIETY v. HANLEY.

argument as to restraint of trade. If several dairymen entered into partnership by deed, it would be a perfectly lawful stipulation, if each of them agreed to supply all his milk to the firm, and sell through it alone, and not individually to the public. The term "milk-supplying member" means a person who sells milk and joins the society. Presumably he does so for his own advantage—that he may have a sure customer for all the produce of his stock. At all events, he has notice of the restrictive rule: *Catt* v. *Tourle* (1); Matthews on Covenants in restraint of Trade, p. 71; *Jones* v. *North* (2); *Elliman* v. *Carrington* (3); *Morris* v. *Colman* (4), *per* Lord Eldon, at p. 438; *Rannie* v. *Irving* (5). In *Slattery* v. *Naylor* (6), the by-law objected to prohibited interment in a particular cemetery. Lord Hobhouse, in delivering the judgment of the Privy Council, points out, at p. 453, the danger of a Court treating a by-law which has been made by competent authority as void, merely because it does not contain qualifications which commend themselves to judicial minds.

As to withdrawal, see *In re United Service Share Purchase Society, Limited* (7), where Neville, J., held that the liability of a member for unpaid shares in a society like this does not terminate with death, unless the rules so provide. In cases of partnership, apart from the Act of 1890 (53 & 54 Vict. c. 39), and special clauses in the deed, the partnership would continue during the joint lives of the partners: 2 Key & Elph. (8th ed.) 323.

Corvan, K.C., in reply:—

In *Baker* v. *Hedgecock* (8), Chitty, J., referring to the principle on which Courts have acted in severing contracts in restraint of trade—dividing the good from the bad instead of disregarding the whole agreement as void, quotes Willes, J., in *Pickering* v. *Ilfracombe Railway Co.* (9), and proceeds: "That statement neces-

(1) L. R. 4 Ch. App. 654.
(2) L. R. 19 Eq. 426.
(3) [1901] 2 Ch. 275.
(4) 18 Ves. 437.
(5) 7 M. & Gr. 969.
(6) 13 App. Cas. 446.
(7) [1909] 2 Ch. 526.
(8) 39 Ch. D. 520.
(9) L. R. 3 C. P. 250.

sarily involves the proposition that the covenant consists of two parts," such as *Price* v. *Green* (1), which he cites as a typically severable covenant, and continues: "But if the plaintiff's argument be good, then in every such case the Court could carve out of the unreasonable distance a distance which would be reasonable. Thus, if the covenant were, *e.g.*, not to carry on business in any part of the whole world the Court would be asked to uphold it by construing it as a covenant not to carry on the business within, say, a limit of two miles, which would, in effect, be making a new covenant, not that to which the parties had agreed." Here it is impossible to divide the rule without in effect making a new rule. The general question of the reasonableness of this class of prohibition, having regard to the presumable objects of the parties to the contract, was very fully dealt with in *Collins* v. *Locke* (2): see judgment of Sir Montague E. Smith, pp. 686, 689; where the restraint is "arbitrary and useless between the parties," where it goes further than is required "to afford a fair protection to the interests of the party in favour of whom it is given," and is "so large as to interfere with the interests of the public," it is oppressive, and in the eye of the law unreasonable. These were the words of such great jurists as Lord Ellenborough and Chief Justice Tindal, quoted in the unanimous judgment of the Privy Council as the tests of unreasonableness; and tried by these tests the unreasonableness of this rule is plain. Hardcastle on Statutes (ed., 1907), pp. 276, 277.

June 24.

THE LORD CHANCELLOR:—

The appeal is from an order made by the King's Bench Division, upon a case stated by the Lord Chief Justice. The civil bill brought originally by the plaintiffs was to claim a sum of £25 against defendant, for his alleged default in not complying with rule 5 (*a*) of the plaintiffs' rules. The County Court Judge of Tipperary dismissed the claim, but the King's Bench Division held that the full demand was enforceable.

It is a notable fact, that the rules in question do not contain, in any express form, a rule providing for conditions under which

(1) 16 M. & W. 346. (2) 4 App. Cas. 674.

Appeal. 1912.

TIPPERARY CREAMERY SOCIETY *v.* HANLEY.

The Lord Chancellor.

a member, once installed in the society, can withdraw his membership from it. No doubt he may cease to be a member on transferring his shares in the society, but, to do so, the consent of the plaintiffs' committee is necessary. The circumstances of an attempted transfer may make it difficult, in any particular case, owing to the inability of the actual member to obtain a purchaser of his shares who would be acceptable to the committee; and in that event, no guide is given by the rules under which the member would be able to shake off the serious responsibility which, according to the plaintiffs, rests on particular members up to the very termination of their connexion with the society. The omission of any express rule regulating withdrawals under ordinary conditions was a point apparently of most importance before the King's Bench Division. While, I think, an express rule would be natural and proper, I do not propose to express a definite opinion upon the necessity of the matter, having regard to the view I take on the first question arising, regarding the real meaning, effect, and validity of rule 5 (*a*). The plaintiffs insist under that rule that any milk-supplying member of the society is bound to deliver to the society's creamery, on every working day, all the milk produced from his cows, save alone such milk as may be required for use in his household. For default in so doing, any member bound by the rule becomes subject to the obligation of paying liquidated damages at the rate of one shilling per cow per day, for every cow's milk not so delivered. The defendant here, though a member of the society for some time, never delivered any milk to the society, and the sum of £25 represents the damages alleged to be payable by him, on that footing, to the plaintiffs. The defendant is the owner, as I understand, of thirty shares of £1 each; but it is clear that the possession of a single share would place any milk-supplying member under the same degree of liability. It was not alleged in the argument that the rules were either skilfully or prudently prepared, and the question is, as they stand, whether or not it is open to the plaintiffs to enforce the rule 5 (*a*) in the substantial sense I have just indicated. At the present stage, I think it must generally be accepted that the rule applies to any member of the society,

who sells the milk of his cows, in the ordinary way known to all our experience. The controversy, therefore, in that respect must be taken to be at an end.

The rule itself, however, has been challenged before us, with a vigour greater, as it occurs to me, than that with which it was discussed before the King's Bench Division. The defendant's counsel maintain that the rule expressly provides that in the case of a milk-supplying member he is obliged to deliver to the plaintiffs' creamery all the milk of all his cows, except as before indicated. They have maintained that there is no limitation whatever as to the locality of the lands in which the cows may be found—whether in county of Tipperary itself, or in any other county of Ireland. Indeed, while I remember the readiness exhibited by the learned counsel for the plaintiffs to have a restricted interpretation placed on the words, no one has attempted to put any limit upon them, and their operation was certainly not fixed as being confined even within the whole county of Tipperary. The words themselves, *prima facie*, take effect over the whole country. No possibility appears to exist of placing any definite limitation upon them. In that state of affairs, and under the rules of a society which a member can only leave by transferring his shares with the assent of the committee, the Court has been asked to hold that the rule, as it at present stands, is an unreasonable restraint of trade, and void. It is not possible for us, in my opinion, upon any satisfactory ground to impose bounds upon the scope of that rule. No standard has been, or can be, applied to it; and the law in such a situation is well enunciated in the judgment of Mr. Justice Willes in *Pickering* v. *Ilfracombe Railway Co.* (1). I find it quoted by Mr. Justice Chitty in *Baker* v. *Hedgecock* (2) as follows:—"The general rule is that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality is created by statute or by the common law, you may reject the bad part and retain the good." That, Mr. Justice Chitty said—as it plainly does—necessarily involves the proposition that the covenant consists of

(1) L. R. 3 C. P. 250. (2) 39 Ch. D., at p. 522.

Appeal. 1912.

TIPPERARY CREAMERY SOCIETY v. HANLEY.

The Lord Chancellor.

two parts. In his own case, dealing with a single contract, Mr. Justice Chitty added—"Thus, if the covenant were, *e.g.*, not to carry on a business in any part of the whole world, the Court would be asked to uphold it by construing it as a covenant not to carry on the business within, say, a limit of two miles, which would in effect be making a new covenant, not that to which the parties agreed." Eventually the learned Judge said he did not intend to lay down the principle contended for, namely, that the Court could create or carve out a new covenant for the sake of validating an instrument which otherwise would be void. Lord Lindley, as Master of the Rolls, in *Underwood & Son* v. *Barker* (1) puts the matter as finally settled. He says:—"The modern doctrine, as I understand it, is that if an agreement restraining a person from carrying on a business is injurious to the public interests of the country, such agreement is invalid to the extent to which it is injurious, but not further, if it is so framed as to permit of division into two portions, one of which is good and the other bad. . . . Further, it was settled that, unless there are circumstances showing some reasonable ground for imposing a restriction on a person's liberty to do what he can for his own support, that restriction will be held not binding upon him. According to this doctrine, an agreement in restraint of trade, which is wider than is reasonably necessary for the protection of the person seeking to enforce it, is invalid, so far as it is wider than is so necessary, and this may invalidate the whole restraint sought to be imposed, if the clause imposing it is so framed as not to be severable." No one in this Court, so far as I remember the argument, was prepared to defend the rule, if read in its apparent general sense; and yet, even if it were an acceptable course for the Court to act upon it, nobody could or did profess to make a definition of the scope of the rule. There can be, as it appears to me, no question as to the restraint of trade involved. The public inconvenience is plain. We are dealing with one of our fundamental and natural foods, and the admitted consequence of a large success on the part of the society would be to expose the public generally to obvious difficulty in obtaining a necessary and usual food for all people,

(1) [1899] 1 Ch. 300, at p. 304.

and particularly for the young. To suggest that the alternative for them in many districts will be that the people must send a messenger a considerable number of miles to the creamery to buy the required milk is at once to demonstrate the great public importance involved in the plaintiffs' operations. A rule, therefore, like rule 5 (*a*) ought to have been carefully and skilfully prepared, and should not have been left, or been attempted to be enforced, in its present form. On the discussion before us it was impossible to think that the rule, as it stands, could be defended. It has a scope and operation altogether beyond what is reasonable for the protection of the society, and nothing that came to light can be regarded as any reasonable consideration to the supplying member, no matter what the condition of his life may be. On any of the tests, now so well defined, could the plaintiffs be allowed to insist on the liability said to arise on the part of the defendant under rule 5 (*a*)?

A comparatively late, if not the latest, statement on the subject, well worth reproduction, is to be found in Lord Justice Farwell's judgment, pp. 520–521, in *Russell* v. *Amalgamated Society of Carpenters and Joiners* (1). "The law as to restraint of trade is now well settled. Every contract in general restraint of trade without limit is bad, but a partial restraint limited so as to afford reasonable protection only to either or both of the contracting parties, and so as not to be injurious to the public is good." After referring to Chief Justice Tindal's well-known proposition in *Horner* v. *Graves* (2), Lord Justice Farwell adds: "The present state of the law on this subject was summarized by Lord Macnaghten in the House of Lords in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (3) as follows: 'The true view at the present time, I think, is this: The public has an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are

(1) [1910] 1 K. B. 506.
(2) 7 Bing. 735, at pp. 742, 743.
(3) [1894] A. C. 535.

Appeal. 1912.

TIPPERARY CREAMERY SOCIETY v. HANLEY.

The Lord Chancellor.

exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.'" I am aware of the proposition contained under *Mitchel* v. *Reynolds* (1), and the cases relied on for it, that is "with regard to trade societies and combinations, whether of traders or workmen, the general rule is, that rules which are *bona fide* intended for the protection of the members, and which go no further than are reasonably necessary for that purpose, are not illegal, and may be enforced, though to some extent in restraint of trade." But, as I have already conveyed, the present rule cannot, in my opinion, be vindicated on any of the settled tests.

Mr. Brown, K.C., referred to section 22 of the Industrial and Provident Act, 1893, stating that the rules of a registered society should bind the society and the members to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were contained in such rules a covenant on the part of the member to conform thereto, subject to the provisions of the Act. That provision, however, does not give the rules an absolute effect, not more than if the member had made the rules his express act, under his own hand and seal. In the circumstances the rules must "not be repugnant to the general laws of the realm," just as they must be subject to the provisions of the Act. If, then, the objections raised to rule 5 (*a*) are, as I think they are, well grounded, the plaintiffs' claim cannot be enforced. The appeal will be allowed, with the usual result of costs.

(1) 1 Smith's Leading Cases (10th ed.), 391, at p. 415.

HOLMES, L.J. :—

The civil bill that has led to this appeal was brought by a creamery registered under the Industrial and Provident Societies Act, 1893, to recover from John Hanley, one of its members, the sum of £25 for refusing to supply the Company with the milk of his cows, in contravention of its rules. A Company or Society registered under the Act is obliged to provide by rules for certain matters set forth in Schedule II of the Statute; and the plaintiffs' rules are seventy in number. I have only read such of them as the Court has been told are relevant to the question for decision; and I regret to be unable to congratulate the draftsman on his capacity for lucid exposition. I am not sure that the best and simplest way of dealing with this appeal is to hold that the plaintiff Company is not entitled to recover, on the ground that the rules relating to the question at issue are so obscure as to be unintelligible.

I shall, however, endeavour to ascertain their meaning; and as the result will be to dismiss the plaintiffs' civil bill, the defendant will not suffer by my making the attempt.

From Rule 1, taken in connexion with Rule 5, it appears that the society has two classes of members—"Special members," being persons who sign the application for registration of the society, and "members," being such persons resident in certain townlands in county Tipperary as the special members, and subsequently the committee, may admit to membership. The defendant is a member of the second class; and the provision under which he is sued is contained in Rule 5*a*, declaring that each milk-supplying member shall, so long as he remains a member of the society, deliver to the creamery on every working day all the milk produced from his cows (except such as may be required for use in his household), and on failing to do so shall pay to the society, as liquidated damages, the sum of 1*s*. per cow per day for every cow's milk not so delivered. It will be observed that the term, "milk-supplying member," occurs here for the first time, and it is said that, inasmuch as the defendant never either before or after he became a member supplied milk to

Appeal. 1912.

TIPPERARY CREAMERY SOCIETY v. HANLEY.

Holmes, L.J.

this creamery, he does not come within the provision, whatever be its meaning.

I thought for some time that it might relate to a class of members referred to at the end of Rule 5 in the words "Every person, other than a member, who has supplied milk to the society's creamery for one year, shall apply for such number of shares as are required to be held by members, and the committee shall thereupon allot the shares so applied for." It occurred to me that if the first "*shall*" in this clause were read "may," it would have the effect of conferring a privilege on the person described therein, and that if this were so, it would not be unreasonable if he took advantage of such privilege to subject him to the obligation under which the "milk-supplying member" is placed in the following rule. I still think that this is most likely what was intended; but I fear that such a construction could only be arrived at by doing too much violence to the language actually used. I have therefore considered what the result would be if I were to hold that the meaning is that given to it by the Lord Chief Baron—a member who sells milk to anyone—in other words, a dairy farmer.

The second schedule to the Act sets forth, amongst matters to be provided by the rules, "a determination whether and how members may withdraw from the society"; but nothing on this subject is to be found in the plaintiffs' rules. It has been argued that this want vitiates all the rules; but, although the omission is a violation of a requirement of the Act, I cannot hold that rules otherwise legal are by reason thereof made void. I agree with the Lord Chief Baron that the absence of a rule on this subject amounts to a determination that members cannot withdraw from the society except by a transfer of their shares, which by Rule 27 can only be made with the consent of the committee. The result, therefore, of a member not being able to withdraw from the society except by transferring his shares with the consent of the committee, taken in connexion with Rule 5 (*a*), may and probably will be, that a milk-supplying member, in the sense in which I am now construing these words, will during his life be obliged, subject to heavy penalties in case of failure, to sell all the milk produced from his cows (except such as may be required for use in his household) to the creamery at such price as the

committee will prescribe. He will not be at liberty to give portion away in charity, or to sell at a reduced price to labourers on his farm—nor is this all—although when he becomes a member he is to be resident in one of the prescribed townlands, there is no provision terminating his membership if he goes to reside elsewhere, or confining the obligation to sell his milk to that supplied by cows kept thereon. If he takes a dairy-farm in county Kilkenny in addition to or in substitution for his Tipperary farm, he must, if he is to avoid the penalty, deliver at great trouble and expense the milk of the cows on such farm to the Tipperary Co-operative Creamery. Let me test this result by our legal principle that forbids contracts in unreasonable restraint of trade. From every point of view, it is, in my opinion, highly unreasonable. A member whose sole occupation is that of a dairy-farmer, and who is unsuited for any other pursuit, is doomed to have but one customer to whom he must sell all his milk at a price over which he has no real control. There is no time limit of this obligation, nor any means by which he can free himself from it by independent action.

But the position of members who have milk to sell is only somewhat more unfortunate than members of the public in their neighbourhood who desire to buy. It is said that there are over three hundred members in this creamery; and the committee which manages its business may, and probably will, arrange to export to England, or to send to a distant city, all its butter. How are the surrounding inhabitants who are not cow-keepers, but who require cream and butter for their families, to be supplied? There may be, among the members, friends who would be willing to sell to them, and to whom they would be ready to pay a good price; but this cannot be done. Surely this is a restraint on trade injurious to the public, and therefore illegal. Furthermore, the provision to which the defendant objects is not necessary for the reasonable protection of the society. I can understand that to bring a creamery into working order requires a substantial expenditure of money that must be forthcoming from some quarter, and that there would be no objection to a rule that members, in addition to paying the price of their shares, should continue to sell to the society the milk of such cattle as are fed

Appeal. 1912.

TIPPERARY CREAMERY SOCIETY *v.* HANLEY.

Holmes, L.J.

within a specified distance, for a limited period. A regulation of this kind would be reasonable, and the same result might be obtained in other ways.

An intelligent draftsman would have little difficulty in preparing rules adequate to protect the society without placing unreasonable restrictions and obligations upon the members. But such rules must differ essentially from those with which I have been dealing in the present case. The Court has been asked by counsel for the society how does the contract here differ from a similar contract by a person, whose business is to produce a particular article or class of goods, entered into with a wholesale distributor. I answer that there is no substantial difference, and that neither contract could be enforced. Let me suppose that in the days of hand-looms a weaver, who had no other means of livelihood, had contracted with a merchant in Leeds that he would sell to him the output of his loom during his whole life at a price to be fixed by the merchant, would any lawyer argue that such a contract was legal? It is because the contract arising from Rule 5*a* is of the same character that I hold it void, and that the dismiss of the civil bill with costs, given by the County Court Judge, must be restored.

It follows that the appeal shall be allowed with the costs of this and the Divisional Court.

CHERRY, L.J.:—

After careful consideration of this case I also have come to the conclusion that the decision of the King's Bench Division cannot be sustained, and that the County Court Judge was right in dismissing the plaintiffs' civil bill. The action is one to recover penalties for breach of the rules of the plaintiffs' company, of which the defendant was a member, though a somewhat unwilling one, as he had to be sued for the calls upon the shares for which he, in the first instance, had applied. Now, it is a well-established principle of construction that a statute, or a contract, imposing a penalty should be strictly construed; and that, unless the language is clear and, in every way, free from ambiguity, the penalty ought not to be enforced. As in the case of a criminal charge, the

defendant is entitled to the benefit of a doubt, if there be one, as to the meaning of the language;—or, in other words, the construction most favourable to him must be applied, if more than one meaning is at all possible. This rule of construction should, of course, be carefully followed in a case where the penalty is, as in this case, very substantial. A member of the plaintiff's society is liable to a fine of one shilling, per cow, per day, for breach of the rule sought to be enforced in the present case; *i.e.*, a member, who is a dairy-farmer keeping, say, twenty cows—not a very large number for a Tipperary or Limerick dairyman—would be liable to pay £365 a year to the society for breach of a rule of which he possibly may not have been aware at all. Indeed, it is stated in the present case that the defendant never even applied for a copy of the rules until the civil bill for the penalties was served. I do not think that he could have been aware of the enormous liability he was incurring by his non-compliance with the rule on the plaintiffs' construction of it. If he were, I think that he would, at all events, have secured a copy of it for his guidance.

The rule provides that "each milk-supplying member shall, so long as he remains a member of the society, deliver to the society's creamery on every working day all the milk produced from his cows (except such as may be required for use in his household), and in accordance with the regulations laid down by the committee from time to time for the delivery of milk, and any member who shall fail to do so shall pay to the society (as liquidated damages and not as a penalty) the sum of one shilling per cow per day for every cow's milk not so delivered."

The rule applies only to "milk-supplying members." Now, what is a "milk-supplying member"? There is no definition of the term in the rules. It is, as the Lord Chief Baron has stated in his judgment, a curious phrase. Three possible interpretations of the term were suggested in argument before us. The first—that adopted by the Divisional Court—was "any member who keeps dairy cows, and who supplies the milk from them to any person outside of his own household." The other interpretations suggested were either "any member in the habit of supplying milk to the society's creamery," or "any person

Appeal. 1912. TIPPERARY CREAMERY SOCIETY v. HANLEY. Cherry, L.J.

who had become a member under the provisions of the last clause of Rule 5, by actually supplying milk for one year to the creamery." Frankly I must confess that I cannot make up my mind as to which of these three meanings was the one intended by the draughtsman of the rule. My difficulty in adopting the first construction suggested is, that it is such a straining of the language. "Milk-supplying member" seems to me naturally to suggest a member supplying milk to the society, not a person who merely deals in milk. If the rule was intended to apply, as Mr. Carrigan suggests, to every member who keeps cows, why does it not say so? "Every member who keeps cows shall supply all the milk from his cows to the society's creamery except so much as he may require for his own household." That would be a clear and intelligible rule. But would the defendant have joined the society if he knew of such a rule? I do not think that he or any other sensible dairyman would.

The second meaning of the phrase suggested, namely "every member in the habit of supplying milk to the creamery," seems to me to be a more natural construction of the language. The society might naturally desire a regular, not a spasmodic, supply of milk. They might not care for a man coming with milk on one day, and not coming on another, and so might provide the penalty for irregularity or uncertainty.

The third meaning suggested, namely, a person who had acquired the right to become a member, under the concluding words of Rule 5, by actually supplying milk as a non-member for one year, is a possible, though not, I think, a probable meaning of the phrase. It points, however, at all events, to a distinct class of members, which the other interpretations do not; for according to the interpretation put upon the rule by the Court below, a man might be a "milk-supplying member" to-day, and an ordinary member to-morrow, according as he sold or bought cows.

Three different interpretations of the rule being therefore, in my opinion, possible, I feel bound in this action for penalties to give the defendant the benefit of that one which is most favourable to him. He has never at any time supplied milk

to the society's creamery, though he has been a member for the four years during which the society has existed. I assume this because it is stated in the case that he was present at two meetings convened for the purpose of forming the Company. I presume also that he has kept cows during all that time. If this be so, I can hardly think that he regarded the rule as applying to himself, if he was aware of it at all. He was present, it is true, at the meeting at which it was adopted, but he may not have heard it read, or if he heard it, he may have understood it as applying to members only who at some time or other undertook to supply milk to the creamery. In my opinion it would be both unjust and unfair to award penalties against him under these circumstances. If the plaintiff company seek to enforce penalties, they, at least, should see that the meaning of their rules is clear and unambiguous. I do not think that this rule is either clear or unambiguous, and I therefore think that it cannot be enforced against the defendant in the present case.

Apart from these considerations as to the true meaning of the rule, there are other reasons why, I think, it cannot be enforced in its present shape. Expressed in the general way in which it is, it binds members who come within its provisions to send all the milk their cows produce to the society's creamery, except what is necessary for their own domestic use. There is no limit of time or distance in the rule. It amounts therefore to an absolute prohibition of the sale of milk by such members to any person whomsoever, other than the plaintiff company; and as a member cannot withdraw from membership, and cannot transfer his shares without the consent of the committee under Rule 27, it may bind him for his whole life. Such a rule is clearly one in restraint of trade.

The general rule of our law as to agreements in restraint of trade is that they are considered to be against public policy and void unless the restraint is partial only, and reasonable in relation to the objects of the contract. The effect of the rule which is sought to be enforced in the present case, if interpreted literally, is to prohibit the member who is bound by it from selling, at any time, or in any place, a single quart of milk to any person

Appeal.
1912.

TIPPERARY CREAMERY SOCIETY v. HANLEY.

Cherry, L.J.

whomsoever except the plaintiffs. Counsel for the respondents perceived how unreasonable such a restriction would be, and admitted that it could not be enforced, say, as to a farm in Antrim or Donegal. Imagine a dairy-farmer in Antrim being bound to deliver milk every day in Tipperary! And it is to my mind quite clear, on the strict reading of the rule, that it would so apply, if a member of the society purchased or in any way acquired a dairy-farm in Antrim. The answer given by plaintiffs' counsel to this argument was that the contract could only be considered as applying to the immediate locality, and when the question was asked by the Court, to what distance, the only answer they could give was "a reasonable distance to be determined by the Court." But the cases cited by Mr. Corvan abundantly prove that a contract cannot be construed in this way. You cannot take an unreasonable contract and enforce it so far as you think it is reasonable, unless the contract is itself divisible.

In *Baker* v. *Hedgecock* (1) an agreement not to carry on "any business whatsoever" within a certain distance from a shop in High Holborn was sought to be enforced. The plaintiff admitted that the covenant was so wide as to be unreasonable, and therefore incapable of being enforced, but he asked the Court to treat the covenant as divisible, and to enforce it to the extent to which it might be considered reasonable, *i.e.*, so far as it applied to the business of a tailor, which was the business carried on by the plaintiff, but Chitty, J., refused to adopt this course, and held the entire agreement void. He referred in his judgment to the case of *Price* v. *Green* (2). There a covenant not to carry on a particular business "within the cities of London or Westminster, or within the distance of 600 miles from the same respectively," was held to be capable of division, and good so far as it related to the cities of London or Westminster, though void as to the 600 miles. He then goes on to say: "But if the plaintiff's argument be good, then in every such case the Court could carve out of the unreasonable distance a distance which would be reasonable. Thus, if the covenant were, *e.g.*, not to carry on a business in any part of the whole world, the Court would be asked to uphold it

(1) 39 Ch. D. 520. (2) 16 M. & W. 346.

by construing it as a covenant not to carry on the business within, say, a limit of two miles, which would in effect be making a new covenant, not that to which the parties agreed."

Every word of the learned Judge's remarks applies to the present case. Read literally, this rule is unrestricted as to the distance to which it applies, from the town of Tipperary, where I understand that the plaintiffs' creamery is situated. It may be improbable that a member, who must, in the first instance at all events under Rule 5, have been a resident in the neighbourhood should acquire land and keep cows in a distant part of Ireland, but it is possible; and no Court can, in face of the authorities, attempt to determine where the line is to be drawn, whether 10, 20, 30, or even 100 miles from the creamery. How can a rule so uncertain in its character and unreasonable be enforced?

It makes the matter still worse that there is no provision in the rules enabling a member to withdraw from the society. Once he joins, unless the committee expel him, or allow him to transfer his shares under Rule 27, he is bound by the rules for his whole life. Even if he joined without knowledge of this rule, or if the rule were adopted after he joined, still he is bound, and, on the plaintiffs' construction of the rule, absolutely prohibited from dealing in milk with any person other than the society, wherever he goes and as long as he lives! Such a rule cannot be regarded as a reasonable one for a Court to enforce.

I pass by the argument of the appellants based upon the non-compliance of the rules of the society with the Industrial and Provident Societies Act, 1893, by reason of the absence of any provision determining "whether and how members may withdraw from the society." As it is admitted that the rules might provide that no member should withdraw, and as the absence of any provision at all has the same effect, the omission in the rules is not a matter of importance. It is a mere formal defect, and I prefer to base my decision upon the other matters of substance which have been argued before us.

Solicitor for the plaintiffs: *J. O'Dwyer.*
Solicitor for the defendants: *G. H. Sargint.*

W. G.

K. B. Div. 1912. May 19.

EDGEWORTH, Appellant; THE COMMISSIONERS OF INLAND REVENUE, Respondents (1).

Revenue—Estate duty—Assessment of—Real and personal estate—Settled lands—Aggregation—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 4, *s.* 5 (3); *Finance Act*, 1900 (63 & 64 *Vict. c.* 7), *s.* 12 (2); *Finance Act*, 1907 (7 *Edw.* 7, *c.* 13), *s.* 16.

The 12th section, sub-section (2), of the Finance Act, 1900, cannot be construed (as contended by the Commissioners of Inland Revenue) as if the words "if the Finance Act, 1894, had been passed prior to the death of the disponer" were substituted for the words "if the disponer had died after the said Part," *i.e.*, Part I. of the Finance Act, 1894, or by interposing after the words "the said Part," "and in the event of all parties having estates and interests under the settlement dying before the Finance Act, 1894, came into operation" (2).

Therefore, where freehold lands were subject to the following limitations which took effect, viz., to A for life, remainder to B, the disponer, for life, remainder to C, and B died in 1863, A died in 1864, and C died in 1911, possessed of personal estate:

Held, that for the purpose of assessing the rate of duty payable in respect of C's estate there was no aggregation.

Petition by way of appeal, under section 10 of the Finance Act, 1894 (57 & 58 Vict. c. 30).

The following copy of the material parts of the petition sets forth the facts clearly:—

1. Your petitioner is the sole executrix of the will of her late husband, Antonio Eroles Edgeworth, deceased.

2. The principal value of the real and personal estate of the said Antonio Eroles Edgeworth, deceased, exceeded £5000, but did not exceed £10,000.

(1) Before Palles, C.B., Kenny and Wright, JJ.

(2) It was stated that this construction had been acted on by the Commissioners since the passing of the Act of 1900. The sub-section is given fully in the judgment of Palles, C.B., *infra*, p. 609.

3. The said Antonio Eroles Edgeworth was seized as tenant for life of certain freehold lands (hereinafter called "The Settled Lands") under an indenture of settlement dated the 21st November, 1860, and made between William Edgeworth of the one part, and Edward Rossborough Floyd, M.D., and Michael Pakenham Edgeworth of the other part.

4. The said William Edgeworth, the "disponer" in the said settlement, died on the 29th June, 1863.

5. Charles Sneyd Edgeworth, who was entitled to the settled lands as tenant for life (such life estate having priority to the limitations contained in the said settlement), died on the 31st March, 1864, unmarried, and on his death the said Antonio Eroles Edgeworth entered into possession of the settled lands as tenant for life thereof under the provisions of the said settlement.

6. The said Antonio Eroles Edgeworth died on the 24th April, 1911, and thereupon under the limitations contained in the said settlement Ysidro Francis Edgeworth, a brother of the said Antonio Eroles Edgeworth, entered into possession of the settled lands as tenant for life.

7. The principal value of the settled lands for the purposes of the assessment of duty exceeds £20,000, but does not exceed £40,000.

8. The total principal value of the settled lands, together with the real and personal estate of the said Antonio Eroles Edgeworth, does not exceed £40,000.

9. The Commissioners of Inland Revenue, by a decision dated the 16th February, 1912, have assessed estate duty and interest on the sum of £2822 10*s.* 10*d.*, being the net value of that part of the real and personal estate of the said Antonio Eroles Edgeworth at present available at the sum of £173 9*s.* 8*d.*, such sum including £169 7*s.* for duty which is calculated at the rate of £6 per cent. on the said sum of £2822 10*s.* 10*d.*

10. Your petitioner, on the 24th February, 1912, delivered to the Commissioners a written statement of the grounds of appeal from the said decision.

11. By notice in writing dated the 11th March, 1912, the Commissioners notified your petitioner that they would maintain the said decision on the grounds that under and by virtue of

K. B. Div. 1912.

EDGEWORTH v. COMMRS. OF INLAND REVENUE.

the provisions of section 12 (2) of the Finance Act, 1900, the principal value of the settled lands should be aggregated with the principal value of the real and personal estate of the said Antonio Eroles Edgeworth deceased for the purpose of determining the rate of duty payable in respect of the said real and personal estate.

12. Your petitioner submits that under and by virtue of the provisions of section 12 (2) of the Finance Act, 1900, and section 16, of the Finance Act, 1907; and under the circumstances in this petition set forth, the principal value of the settled lands should not be aggregated with the principal value of the real and personal estate of the said Antonio Eroles Edgeworth, deceased, for the purpose of determining the rate of duty payable in respect of the said real and personal estate, but that the settled lands should be treated as a separate estate by themselves for the purposes of the Finance Act, 1894, and that the estate duty on the principal value of the real and personal estate of the said Antonio Eroles Edgeworth should be calculated at the rate of £4 per cent.

Your petitioner therefore humbly prays that:

1. It be declared that the principal value of the settled lands should not be aggregated with the principal value of the real and personal estate of the said Antonio Eroles Edgeworth deceased, for the purpose of determining the rate of duty payable in respect of the said real and personal estate.
2. That it be declared that the settled lands should be treated as a separate estate by themselves for the purposes of the Finance Act, 1894.
3. That it be declared that the estate duty on the principal value of the real and personal estate of the said Antonio Eroles Edgeworth should be calculated at the rate of £4 per cent.

[The "statement of grounds of appeal," referred to in the foregoing, stated the facts as set forth in the petition, and the grounds were identical with those contained in paragraph 12 above.]

The Commissioners of Inland Revenue delivered an answer admitting the facts as contained in the petition, and submitted that the said sum of £173 9*s.* 8*d.* was payable in respect of estate duty and interest on the said sum of £2822 10*s.* 10*d.*, being the net value of that part of the real and personal estate of Antonio Eroles Edgeworth at present available, on the grounds that under and by virtue of the provisions of section 12 (2) of the Finance Act, 1900, the principal value of the settled lands should be aggregated with the principal value of the real and personal estate of the said Antonio Eroles Edgeworth, deceased, for the purpose of determining the rate of duty payable in respect of the said real and personal estate.

Ronan, K.C. (with him, *Fitz Gibbon, K.C.*, and *E. S. Murphy*), for the appellant.

Serjeant Molony, K.C. (with him, *the Solicitor-General* (*Ignatius O'Brien, K.C.*), and *Coll*), for the Commissioners of Inland Revenue.

The arguments addressed to the Court appear completely from the judgment of the Lord Chief Baron.

The following authorities were cited:—*Attorney-General* v. *Partington* (1); *Abel* v. *Lee* (2); *Attorney-General* v. *Selborne* (3); *Attorney-General* v. *de Préville* (4); *Colquhoun* v. *Brooks* (5); *Attorney-General* v. *Beech* (6); *Richards* v. *McBride* (7); *Attorney-General* v. *Earl Grey* (8); *Commissioners of Income Tax* v. *Pemsel* (9).

PALLES, C.B.:—

In my opinion, this case is too plain for argument. At least I may say that, up to the present, I have been unable to appreciate any question capable of argument that arises in it. We have offered to allow the case to stand over, to enable the Solicitor-General, if he so wished, to be heard; but he does not so desire,

(1) L. R. 4 H. L. 100.
(2) L. R. 6 C. P. 365.
(3) [1902] 1 K. B. 388, p. 399.
(4) [1900] 1 K. B. 223.
(5) 21 Q. B. D. 52.
(6) [1898] 2 Q. B. 147.
(7) 8 Q. B. D. 119.
(8) [1898] 2 Q. B. 534, p. 545.
(9) [1891] A. C. 531.

K. B. Div. 1912.

EDGEWORTH v. COMMRS. OF INLAND REVENUE.

Palles, C.B.

and therefore there is no reason why we should not give judgment now.

At the death in November, 1911, of Antonio Edgeworth, certain lands of the value of £24,800 (of which he was tenant for life) "passed," within the meaning of the Finance Act, 1894. He had, in addition, property to the amount of £9,500. The question to be determined is whether, in ascertaining the rate of duty payable on the property that passed at his death, the property represented by the £9,500 was to be aggregated with that valued at £24,800. The effect of such aggregation would be that the rate of duty upon the £9,500 would be increased from 4 per cent., which would be its rate were there no aggregation, to 6 per cent., the rate if there were an aggregation.

The facts material for the decision of the case are few and simple. At the time of the death the lands were held under the limitations of a disentailing deed, bearing date the 21st November, 1860, executed by one Charles Sneyd Edgeworth, who was tenant for life, and William Edgeworth (the immediate tenant in tail in remainder), by which the lands, subject to the estate for life of Charles Sneyd, were limited to William for life, with remainder to his first and other sons in tail, remainder to Antonio for life, remainder to his first and other sons successively in tail, with remainder to two other persons successively for life, with successive remainders to their respective first and other sons successively (limitations which failed before Antonio's death), with remainder to Ysidro for life, with remainders over unnecessary to be stated. Undoubtedly William was by this settlement the "disponer," within the meaning of the Finance Act. Upon the death of Antonio, Ysidro, who was his brother, became entitled under the settlement to the estates as tenant for life, and he entered into possession. William, the disponer, had died on the 29th June, 1863; and Charles Sneyd, the tenant for life, died on the 31st of March, 1864; and Antonio died on the 24th of April, 1911.

Now, whether there is or is not to be an aggregation depends upon the construction of sub-sect. (2) of the 12th section of the Finance Act, 1900, as altered by 7 Edw. VII, c. 13, s. 16. That sub-section enacts that—

"Where settled property passes (1) on the death of a person dying after the passing of this Act, (2) under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894, and (3) such property would, if the disponer had died after the commencement of the said Part, have been liable to estate duty upon his death, the aggregation of such property, with other property passing upon the first-mentioned death, shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one-half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself."

By 7 Edw. VII, c. 13, s. 16, the effect of this sub-section is altered, and instead of the provision that the aggregation should not cause an increase of more than one-half per cent., it is enacted that there shall be no aggregation at all. The question is, whether the present case comes within this sub-section or not. This settled property passed on in 1911, on the death of Antonio, a "person dying after the passing of the Act of 1900," and it so passed under the disposition of 1860, made by William, a "person dying before the commencement of Part I." of the Finance Act, 1894, as he died, as I have said, on the 29th June, 1863. So that two of the conditions of the sub-section are satisfied. We come then to the third condition:—Would the property, "if the disponer had died after the commencement of the said Part, have been liable to estate duty upon his death." Does that state of facts exist here? We are, for the purpose of ascertaining this condition, to assume that William, the disponer, died after the commencement of the Act, that is, after the 31st July, 1894. As Charles Sneyd, the tenant for life, died on the 31st March, 1864, the lands would have been then vested in the disponer, William, as tenant for life, and, of course, in the assumed event of his having survived the commencement of Part I. of the Act of 1894, it would have been liable upon his death to estate duty under that Act. It is upon the combination of these three events that the legislation now provides that there shall be no aggregation. And if we are to read the words of this sub-section as meaning what they say, there can be no doubt that the Act distinctly says that in such a case there shall be no aggregation.

K. B. Div. 1912.

EDGEWORTH v. COMMRS. OF INLAND REVENUE.

Palles, C.B.

Well, what is the answer to this? It is said that the English Revenue Commissioners, for the twelve years that have elapsed since the passing of the Finance Act, 1900, have been acting upon a practice founded upon the opinion of one of their officials, who we are told is not a barrister; a practice which we have failed to ascertain was adopted upon the advice of any law officer, or even of any barrister or solicitor. To me it is startling that these Finance Acts should be administered in this way; but we cannot help that. I understand that the opinion of this gentleman was, and is, that this section is not to be read in the sense in which all Acts of Parliament, by which a tax is imposed on the subject, are construed, namely, to ascertain what are the words of the Act, and then to ascertain whether the particular case in question falls within those words; but that this section is to be construed as if the words of the sub-section were not what they are, but were other and different words; or, if the Court is unwilling to do that, then that we are to interpolate into the sub-section words which are not contained in it. I need not examine the long line of cases that Mr. Ronan has referred to, with the substance of which every tyro at the bar is familiar, that, in a taxing statute, you must take its words as they are in the statute, and then if the case comes within those words, no matter what hardship is created thereby, the tax is payable; but if the case does not fall within the words of the Act, the tax is not payable, for the Commons, in that event, have not given the duty which the Crown seeks to levy.

Now, the Commissioners of Inland Revenue ask us to read these words—"Such property would, if the disponer had died after the commencement of the said part" (Part I. of the Finance Act, 1894), as equivalent to—"If the Finance Act, 1894, had been passed at a time prior to the death of the disponer"; which in the present case would mean prior to the 29th June, 1863. Such a construction would make a great difference in the present case. For if we regard the words of the Act, we are to assume conclusively that William died after 31st July, 1894, in which event he would have had an estate for life in possession under the settlement, and therefore, the property would have been liable

to duty. But if we assume, as we are asked to do, the wholly different state of facts, that his death was at the actual date on which it took place, but that the Act of Parliament, actually passed in 1894, was to be taken as projected backwards to 1863, and to have been in force at his death, then the lands would not be subject to estate duty at his death, owing to the 3rd sub-section of section 5 of the Finance Act, 1894, and of the prior life estate of Charles Sneyd being then subsisting. I can only say that I cannot make that assumption, which would have the effect of imposing upon the subject a tax which the words of the statute do not give.

Then, secondly, it is said that we are to interpose the words "And in the event of all parties having estates and interests under the settlement dying before the Finance Act, 1894, came into operation" after the words—"If the disponer had died after the commencement of the said part." It is impossible we can do that.

Regretting therefore that we have not had the advantage of hearing the Solicitor-General, in support of this rule which has been acted on by the Revenue for twelve years, we can but express our opinion that it is founded upon a wholly unsustainable construction of the Finance Act of 1900, and declare that under the circumstances there cannot be the aggregation insisted on by the Crown.

We consequently allow the appeal with costs.

KENNY and WRIGHT, JJ., concurred.

Solicitors for the appellant: *H. & W. Stanley.*

Solicitor for the Commissioners of Inland Revenue: *Richard Martin.*

J. M.

INDEX.

ACCIDENT — Arising "out of" the employment—Herd cycling between two farms —Risk connected with employment
See WORKMAN. 1. [430

—— Notice of, and claim, on principal—Failure to serve within prescribed time—Workmen's Compensation Act, 1906, s. 4
See WORKMAN. 2. [129

ADMINISTRATION ACTION — Executor in possession of testator's leasehold — Measure of liability for rent—Receiver
See EXECUTOR. [245, 253

AFFIDAVIT — To remit action by infant to County Court—Visible means - 144
See REMITTING ACTION TO COUNTY COURT.

AGGREGATION—Rate of duty - 606
See ESTATE DUTY.

AMBIGUITY—Rule of Industrial Society
See RESTRAINT OF TRADE. [586

AMENDMENT—40 & 41 Vict. c. 56, s. 76—Certiorari—Defective conviction 64
See WATER SUPPLY.

APPROPRIATION OF PAYMENTS—Goods supplied to partnership turned into limited company - - - - - - 163
See NOVATION.

ASSAULT — Refusal to prosecute — Sureties of good behaviour - - - - 64
See SURETIES OF GOOD BEHAVIOUR. 1.

ASSIGNMENT OF DEBT — *Part of debt—Right of assignee to sue — Equitable assignment — Supreme Court of Judicature Act (Ireland)*, 1877 (40 & 41 *Vict. c. 57*), *s.* 28, *sub-s.* 6; *s.* 27, *sub-s.* 4.] An assignment of part of a debt is not within s. 28, sub-s. 6, of the Judicature Act (Ireland), 1877. Opinion of Bray, J., in *Forster* v. *Baker* ([1910] 2 K. B. 636) concurred in. Decision of Darling, J., in *Skipper and Tucker* v. *Holloway and Howard* ([1910] 2 K. B. 630), dissented from. But the assignee of part of a debt may maintain a Common Law action in respect of such part, where all persons interested in the debt or in resisting it are parties to the action. *Conlan* v. *Carlow County Council, O'Neill and Byrne* - - K. B. 535

AWARD — Against contractor — Bar to claim against principal — Workmen's Compensation Act, 1906, s. 4 - - 129
See WORKMAN. 2.

BANKER — *Principal and agent—Banker and banker's agent—Dual capacity of agent as branch manager and trustee — Constructive knowledge of bank of agent's fraud—Liability of bank to customer in respect of agent's fraud.*] The defendants, an incorporated banking company, employed *D.* as manager of a branch bank at *C.*, where *D.* kept his own private account. *M.*, a customer of the bank, devised his house to his wife, and bequeathed a policy of insurance to the plaintiffs, and appointed *D.* his executor. *M.* died in 1886, at which date the house devised to his wife was subject to a mortgage for £300, and the said policy of insurance was vested in the defendants as security for an overdraft of *M.*, the latter on *M.'s* death amounting to £161 13*s.* 10*d.* *D.* proved the will, and on the defendant company receiving the proceeds of *M.'s* policy of insurance, amounting to £690, this amount was placed to *M.'s* credit in the bank. Shortly afterwards *D.* drew out on his own cheque the balance remaining after payment of *M.'s* overdraft, and lodged it to the credit of his own private account in the bank, which was then largely overdrawn, *M.'s* account being closed. In 1887, the sum of £300, portion of plaintiffs' trust funds, was invested by *D.*, with the consent of plaintiffs, on a transfer to *D.* of the mortgage on the house devised to *M.'s* widow; and the latter, who had a private current account in the bank, thereafter paid by her own cheque the yearly interest on the mortgage, the cheques being handed each year by one of the plaintiffs to *D.* to add to the money in the bank; these cheques were also in each year placed to *D.'s* private credit in the bank, thereby reducing his overdraft for the time being. In 1893 *M.'s* widow borrowed from her daughters £134, and this transaction was carried out by *D.* entering £134 to her credit in her bank pass-book, and by her and her son, on the requirement of *D.*, signing two undated promissory notes in the ordinary form used by the bank, for £100 and £34 respectively, *D.*

BANKER—*continued.*
saying that he required this to be done "to keep the bank safe, and himself safe." In 1901 *M.'s* widow, who owned a deposit receipt for £300 in the bank, made a present to the plaintiffs of this sum, and endorsed the deposit receipt to them; one of the plaintiffs brought the deposit receipt to the bank, and handed it across the counter to a junior official, *D.* being absent, and told him they wished it added to their other money in the bank. On the same day the deposit receipt was lodged to the credit of *D.'s* private account, thereby reducing a large overdraft. *D.* each year furnished the plaintiffs with an account, purporting to show the balance due to plaintiffs, and adding interest at a fixed rate, and interest on the mortgage; the last of such accounts was dated 1st January, 1909. *D.* left the defendants' employment in 1909, when his own private account was largely overdrawn (the overdraft, however, being secured to the bank), and died shortly afterwards. In an action by the plaintiffs against the defendant company to recover the amount named in the account last furnished as due on an account stated and settled, and for money had and received for the plaintiff's use: *Held*, that the defendants were liable. *Malone* v. *Belfast Banking Company* K.B. 187; App. 214

BANKRUPTCY—Chattels comprised in bill of sale—Bankruptcy of grantor before first instalment became payable — Goods whether in order and disposition of bankrupt - - - - 170
See Bill of Sale.

BILL OF SALE—*Bankruptcy of grantor before first instalment accrues due—Property whether in his order and disposition with consent of grantee—Irish Bankrupt and Insolvent Act*, 1857 (20 & 21 *Vict. c.* 60), *s.* 313—*Bills of Sale (Ireland) Act*, 1879, *Amendment Act*, 1883 (46 *Vict. c.* 7), *s.* 7.] The grantor in a bill of sale which was in the form prescribed by 46 Vict. c. 7, and was duly registered, was adjudicated a bankrupt before the first instalment under the bill of sale became due. The grantee thereupon took possession of the property comprised in the bill of sale, and remained in possession thereof until displaced later in the same day by the messenger of the Court of Bankruptcy. *Held*, reversing the order of Boyd, J., that the property was not in the order and disposition of the bankrupt with the consent of the true owner. *In re Stanley* (17 L. R. I. 487) approved of and followed. *In re Hayes* ([1899] 2 I. R. 206) overruled. *In re Ginger*; *Ex parte London and Universal Bank* ([1897] 2 Q. B. 461) distinguished. *In re Harvey* - App. 170

BUILDING CONTRACT—*Penalty for non-completion within contract time—Delay caused by extra works — Final certificate of engineer —*

BUILDING CONTRACT—*continued.*
Jurisdiction of engineer to determine the exclusion of penalties.] A building contract, entered into by *G.* for the erection of artisans' cottages for an Urban District Council, contained the following conditions and provisions, viz.: That, in consideration of the payment of the contract price by instalments, payable on the certificate of the Council's engineer, the contractor should within one week from the signing of the contract begin, and within nine months from that date complete the contract works, unless delayed by strikes or lock-outs: that the contractor should carry out all necessary works and complete all works specified in the plans, &c., annexed to the contract, or implied or incidental thereto, or to be thereafter specified or required by explanatory instructions and drawings, being in conformity with the original specifications, &c., and such additional instructions and drawings not being so in conformity with the said original specifications, &c., as should from time to time during the progress of the contract work be required by the Council's engineer, subject, in case of non-completion within the contract time, to forfeiture out of the money due to the contractor of a sum of £5 per week for every week elapsing after the completion of the contract time: that it should be lawful for the Council's engineer, or the Council by written instructions, to make alterations and deviations, and to supply omissions in or to the original specifications, &c., and that such alterations, &c., should not vacate the contract, but should be determined as thereby provided, and the value thereof deducted from or added to the contract price: and that the decision of the Council's engineer "with respect to the amount, state, and condition of the works actually executed, and any other question that might arise concerning the construction of the plans, sections, elevations, drawings, and specifications and contract, and the execution of the works included therein, or in anywise relating thereto, shall be final and legally binding and without appeal. The contract works were, in fact, not completed within the contract time; but certain extra works had been ordered by the Council, and were executed by the contractor. The Council's engineer having from time to time given certificates for the payment of the instalments of the contract price, by his final certificate awarded a sum in respect of extra works, but in that certificate did not refer to, or make any deduction in respect of, penalties for non-completion within the contract time. In an action by *G.* for the recovery of portion of the contract price from the Council, the Council pleaded that penalties for non-completion within the contract time had arisen, and that the same should be deducted from the money due to

BUILDING CONTRACT—*continued.*
the plaintiff, who in reply pleaded that the delay in completion was caused by the extras ordered and executed, and further, that by reason of the final certificate of their engineer, the defendants were estopped from making any claim in respect of penalties. The jury found that there was no waiver of the right to penalties by the defendants, and assessed damages for delay at £30. *Held*, by Gibson, Madden, and Boyd, JJ., that the jurisdiction conferred upon the Council's engineer by the contract did not extend to his determining whether the penalty clause in the contract was or was not excluded by the order for, and execution of, the extras. *Held*, by Gibson and Madden, JJ. (Boyd, J., *dissentiente*), that as it appeared from the report of the learned Judge at the trial, and from the course of the trial, that the plaintiff had been prevented from completing within the contract time by the extra works ordered, the penalty clause of the contract was extinguished, and the plaintiff was entitled to judgment on his claim. *Held*, by Boyd, J., that upon its true construction the contract was one whereby the plaintiff contracted to complete not only the original works contracted for, but also the extra works ordered, within the contract time, and that the defendants were entitled to deduct the penalties, which amounted to £75. *Gallivan* v. *Killarney Urban District Council* - K.B. 356

BREACH OF CONTRACT — Within the jurisdiction - - - - - 55
See SERVICE OUT OF THE JURISDICTION.

CARETAKER—*Agreement—Right to go behind — Alleged collateral agreement — Justices — Summary jurisdiction — Declining jurisdiction — Certiorari—Landlord and Tenant (Ireland) Act, 1860 (23 & 24 Vict. c. 154), s. 86.*] The prosecutors, who had been yearly tenants to the National Bank of certain premises, signed an agreement acknowledging that they had been put into possession of the premises by the bank as servants and caretakers, and undertaking to give up possession on one week's notice. They signed at the same time a promissory note payable four months after date for the amount of arrears of rent then due. After the expiration of the four months the bank gave notice requiring possession, and, possession not having been given, issued a summons under section 86 of 23 & 24 Vict. c. 154, requiring the prosecutors to show cause why they should not deliver up possession of the premises to the bank. On the hearing of the summons the prosecutors sought to make the case that the arrangement with the bank was that the caretakers' agreement should be returned if the amount of the promissory note was paid, and that it had been paid. The Justices, however, refused to go

CARETAKER—*continued.*
behind the written agreement, and made an order for possession. *Held*, that the prosecutors were entitled to put forward the case attempted to be made by them; that the Justices by refusing to put it forward had declined jurisdiction; and that the order of the Justices should be quashed on *certiorari*. *The King* (*Corcoran*) v. *Justices of County Wicklow* - - - - K.B. 349

CASES—*Cooke* v. *Midland Great Western Railway of Ireland Co.* ([1909] A. C. 229) distinguished - - - 95, 290
See NEGLIGENCE. 1.

—— *Forster* v. *Baker* ([1910] 2 K. B. 636), opinion of Bray, J., in, concurred in - 535
See ASSIGNMENT OF DEBT.

—— *Ginger, In re*; *Ex parte London and Universal Bank* ([1897] 2 Q. B. 641) distinguished
See BILL OF SALE. [170

—— *Hayes, In re* ([1899] 2 I. R. 206) overruled
See BILL OF SALE. [170

—— *Herd* v. *Summers* (7 Fraser, 5th series, 870) followed - - - - - 129
See WORKMAN. 2.

—— *Pickavance* v. *Pickavance* ([1901] P. 60) statement in, as to effect of withdrawal of summons dissented from - 44
See WITHDRAWAL OF SUMMONS.

—— *Priestly* v. *Fernie* (3 H. & C. 977) followed and applied to debt incurred by wife as agent for her husband - - 125
See HUSBAND AND WIFE.

—— *Purnell* v. *Great Western Railway Co. and Harris* (1 Q. B. D. 636) followed 551
See NEW TRIAL.

—— *R.* (*Johnston*) v. *Armagh* (*Justices of*) (43 Ir. L. T. R. 112) not followed - 64
See SURETIES OF GOOD BEHAVIOUR. 1.

—— —— (*Leonard*) v. *Carlow* (*Justices of*) (45 Ir. L. T. R. 48) not followed - 545
See COTTIER.

—— —— (*Maher*) v. *Kilkenny* (*Justices of*) (5 New Ir. Jur. Rep. 113) applied and followed
See COUNTY SURVEYOR. [283

—— *Skipper and Tucker* v. *Holloway and Howard* ([1910] 2 K. B. 630) decision of Darling, J., in, dissented from - - 535
See ASSIGNMENT OF DEBT.

—— *Stanley, In re* (17 L. R. I. 487) approved of and followed - - - - 170
See BILL OF SALE.

—— *Stribling* v. *Halse* (16 Q. B. D. 246) held not a binding decision in Ireland - 17
See PARLIAMENT.

CERTIFICATE—Of engineer—Penalty clauses —Extra works - - - 356
See BUILDING CONTRACT.

CERTIORARI—Conviction—Defect in—Defendant not misled—40 & 41 Vict. c. 56, s. 76—Amendment - - - - 64
See WATER SUPPLY.

—— Conviction — Negativing exception — Evidence — Incorporation by reference of complaint as in summons — Insufficient allegation of fraud in conditional order
See DISQUALIFICATION. [1

—— Justices declining jurisdiction—Caretaker's agreement—Alleged collateral contract
See CARETAKER. [349

—— Sureties of the peace and for good behaviour — Order not showing jurisdiction *ex facie* - - - - - - 374
See SURETIES OF GOOD BEHAVIOUR 2.

CHAIRMAN—Urban District Council—Annual election—Equality of votes - 440
See URBAN DISTRICT COUNCIL.

CHOSE IN ACTION—Assignment of part of debt - - - - - - 535
See ASSIGNMENT OF DEBT.

CLAIM—On principal—Workmen's Compensation Act, 1906, s. 4—Non-service within prescribed time , - - 129
See WORKMAN. 2.

COLLISION—*Practice, Admiralty—Action for damages from collision—Transfer to Admiralty side of King's Bench Division—Judicature Act (Ireland)*, 1877 (40 & 41 *Vict. c.* 57), *ss.* 9, 48—*Judicature Act (Ireland)*, 1897 (60 & 61 *Vict. c.* 66), *s.* 6—*R. S. C., Order XXXVI, R.* 5; *Order XLIX, R.* 3.] The plaintiffs brought an action in the King's Bench Division for damages to their barge, occasioned by a collision in the River Foyle, near Londonderry, owing to the alleged negligence of those in charge of a steamer of the defendants. The venue was laid in the county of the city of Londonderry, admittedly the most convenient venue, having regard to the residences of the witnesses. The pleadings raised questions as to the proper navigation of the respective vessels, and the observance of those in charge of them of certain of the Regulations for Preventing Collisions at Sea. The Court, on the application of the defendants, made an order that all further proceedings in the action should be carried on as an action in the King's Bench Division (Admiralty), and the action disposed of by the Judge assigned for the hearing of Admiralty actions, assisted by nautical assessors. *Strabane Canal Company* v. *London and North-Western, and Lancashire and Yorkshire Railway Companies* - K. B. 147

CONDITION—Marriage on - - 445
See MARRIAGE. 2.

CONTINUOUS ACT—Breaking windows on successive days - - - 310
See MALICIOUS INJURY.

CONTRACT—Breach within the jurisdiction 55
See SERVICE OUT OF THE JURISDICTION.

—— Building - - - - - - 356
See BUILDING CONTRACT.

—— Collateral with caretaker's agreement 349
See CARETAKER.

—— Relation of landlord and tenant for less than a year—23 & 24 Vict. c. 154, s. 4 318
See LANDLORD AND TENANT.

—— With partnership afterwards converted into limited company - - - 163
See NOVATION.

CONVICTION—Justices—Defective—40 & 41 Vict. c. 56, s. 76—Defendant not misled—Amendment—Certiorari - - 64
See WATER SUPPLY.

—— Justices—Incorporating complaint as in summons—Negativing exception—Certiorari
See DISQUALIFICATION. [1

—— Justices—Incorporating complaint as in summons — Refusal of party aggrieved to prosecute—Certiorari - - 64
See SURETIES OF GOOD BEHAVIOUR. 1.

COSTS—Divorce proceedings—Wife's solicitor's costs—Judgment obtained against wife—Bar of husband's liability - 116, 125
See HUSBAND AND WIFE.

COTTIER—*Justices—Determination of tenancy by notice to quit—Proceedings to recover possession—Demand of possession not necessary—Landlord and Tenant Law Amendment Act (Ireland)*, 1860 (23 & 24 *Vict. c.* 154), *s.* 86.] In proceedings before Justices under section 86 of the Landlord and Tenant Law Amendment Act (Ireland), 1860, to recover possession of a cottier tenement after the interest of the tenant has been determined by notice to quit, it is not necessary to allege in the summons, or to prove, a demand of possession by the owner or his known agent or receiver. Such demand is necessary only in respect to the second class of cases dealt with in the section, viz.: permissive occupants such as servants, herdsmen, or caretakers. *Rex (Leonard)* v. *Justices of Carlow* (45 I.L.T.R. 48) not followed. *Killarney R.D.C., Appellants*; *Grady, Respondent* - K. B. 545

COUNTY COUNCIL—Repair of road—Obstruction on part left open for traffic - 392
See NEGLIGENCE. 2.

—— Surveyor — Repair of road — Entry for materials - - - - - - 283
See COUNTY SURVEYOR.

COUNTY COURT—Remitting action to 144
See REMITTING ACTION TO COUNTY COURT.

COUNTY SURVEYOR — *Road materials — Respective rights of county surveyor and contractor to take—Refusal of Justices to grant order to enter land — Subsequent application* — Res judicata—*Grand Jury Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 162.] The provisions of sect. 162 of the Grand Jury Act, 1836, empowering a county surveyor and a contractor to take road materials out of lands, are to be construed *reddendo singula singulis*, and not as conferring concurrent rights on the county surveyor and contractor. Where there is a subsisting contract for the repair of a road, the county surveyor is not entitled to an order to enter the lands to take road materials save in exceptional circumstances, *e.g.*, where such contract has not been duly performed, or in case of sudden damage. *Rex* (*Maher*) v. *Justices of Kilkenny* (5 New Ir. Jur. Rep. 113) applied and followed. *Per* Gibson, J.: A refusal by Justices to grant an application by a road contractor for an order to enter land for the purpose of taking road materials, is not a bar to a subsequent application for such order by the contractor relying on fresh evidence or grounds. *The King* (*Burkitt*) v. *Justices of Fermanagh* [K. B. 283

CREAMERY SOCIETY—Rules—Penalty 586
See RESTRAINT OF TRADE.

CUSTOM OF PORT—Unloading collier—Interchange of work - - - - 529
See WORKMAN. 3.

DEBT—Assignment of part of—Judicature Act, s. 28 (4) - - - - - 535
See ASSIGNMENT OF DEBT.

DELAY—Caused by extra works. - 356
See BUILDING CONTRACT.

DEMAND OF POSSESSION—Cottier tenancy—Notice to quit - - - 545
See COTTIER.

DISQUALIFICATION — *Local Government—Member of council or board of guardians—Absence—Penalties—Local Government (Application of Enactments) Order*, 1898, *Art.* 10 (3), *Art.* 12 (9), (11)—*Justices—Summary jurisdiction—Negativing exceptions—County Officers and Courts (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 56), *s.* 78—*Question, whether preliminary to jurisdiction—Conviction incorporating complaint as in summons—Power to quash on* certiorari—*Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *s.* 39—Certiorari—*Conditional order—Insufficient allegation of fraud.*] If a member of a district council or board of guardians is absent from the meetings of the council or board for more than six months, consecutively, except in case of illness or for some reason approved by the council or board, such person "becomes disqualified by absence," and is liable to the penalty mentioned in Art. 10 (3) of the Local Government (Application of Enactments) Order, 1898; and if he acts or votes after becoming so disqualified, he is liable to the penalties mentioned in Art. 12 (11). The disqualification arises as regards such person on the expiration of the six months, and it is not necessary that the council or board should have declared the office vacant. It is not necessary in a summons to recover such penalties, or in a conviction founded on such summons, to negative the fact that the absence was from illness, or for a reason approved by the council or board. The question whether or not the absence is from illness or for a reason approved by the council or board, is not one preliminary to the jurisdiction of the Justices, but is part of the merits; and on *certiorari* to quash a conviction evidence is not admissible to show that in fact the absence was from illness, or for a reason approved by the council or board. Notwithstanding that s. 39 of the Petty Sessions (Ireland) Act, 1851, precludes objection to a summons, in cases of summary jurisdiction, for any defect in substance or form, and that the order book prescribed by the Lord Lieutenant in Council provides that a conviction is to state the cause of complaint "as set forth in the summons," it is necessary that a conviction should on its face show an offence. One of the grounds set out in a conditional order for a writ of *certiorari* to quash a conviction at petty sessions was, "that facts were suppressed at the hearing which, if disclosed, would have ousted the jurisdiction of the Justices." *Held*, that this could not be read as alleging that the suppression was that of the complainant in the summons, or that it was wilful or fraudulent, and that it was not open to the prosecutor to show that the conviction was obtained by fraud. *The King* (*Gorey*) v. *Justices of County Kilkenny* - - - K.B. 1

DISTRICT COUNCIL — Disqualification of member for non-attendance—Penalty—Summons and conviction not negativing exception - - - - - 1
See DISQUALIFICATION.

—— Urban—Election of chairman—Equality of votes - - - - - - 440
See URBAN DISTRICT COUNCIL.

DIVORCE—Costs of proceedings for—Judgment obtained against wife by her solicitor—Bar to claim against husband 116, 125
See HUSBAND AND WIFE.

DWELLINGHOUSE—Room whether occupied as - - - - - - - 17
See PARLIAMENT.

—— Water supply - - - - 64
See WATER SUPPLY.

ELECTION — Chairman of Urban District Council—Equality of votes - 440
See URBAN DISTRICT COUNCIL.

EMPLOYMENT—Risk connected with—Accident arising out of - - 430
See WORKMAN. 1.

ENGINEER—Certificate — Penalties—Delay—Extras - - - - - - 356
See BUILDING CONTRACT.

EQUALITY OF VOTES—Election of chairman - - - - - - 440
See URBAN DISTRICT COUNCIL.

EQUITABLE ASSIGNMENT — Part of debt - - - - - - - 535
See ASSIGNMENT OF DEBT.

ESTATE DUTY — *Assessment of — Real and personal estate — Settled lands — Aggregation — Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 4, *s.* 5 (3); *Finance Act*, 1900 (63 & 64 *Vict. c.* 7), *s.* 12 (2); *Finance Act*, 1907 (7 *Edw.* 7, *c.* 13), *s.* 16.] The 12th section, sub-section (2), of the Finance Act, 1900, cannot be construed (as contended by the Commissioners of Inland Revenue) as if the words "if the Finance Act, 1894, had been passed prior to the death of the disponer" were substituted for the words "if the disponer had died after the said Part," *i.e.*, Part I. of the Finance Act, 1894, or by interposing after the words "the said Part," "and in the event of all parties having estates and interests under the settlement dying before the Finance Act, 1894, came into operation." Therefore, where freehold lands were subject to the following limitations which took effect, viz., to *A.* for life, remainder to *B.*, the disponer, for life, remainder to *C.*, and *B.* died in 1863, *A.* died in 1864, and *C.* died in 1911, possessed of personal estate: *Held*, that for the purpose of assessing the rate of duty payable in respect of *C.'s* estate there was no aggregation. *Edgeworth, Appellant; Commissioners of Inland Revenue, Respondents* - - - K.B. 606

EVIDENCE—Of negligence 95, 290, 392.
See NEGLIGENCE. 1, 2.

EXCEPTION—Statutory offence—Negativing
See DISQUALIFICATION. [1

EXCLUSIVE JURISDICTION—Justice first seised of case - - - - 151
See JUSTICES.

EXECUTION—*Fi. fa.*—Solicitors for plaintiff—Implied authority - - - 551
See NEW TRIAL.

EXECUTOR — *Lease — Liability for rent — Measure of — Administration action — Receiver — Rent payable in advance.*] The executors of a deceased lessee entered into possession of the demised lands, the rent of which (£140) was payable in advance on 1st November in each year. Within two months of the lessee's death an order for the administration of his estate was made in a creditor's suit which had been instituted in the Court of the County Palatine of Lancaster, and a receiver was appointed by the Court, who took possession and complete control of the leasehold premises, and took any profits arising therefrom, accounting for the same in the Court which had appointed him. In an action to recover one year's rent which became due in advance on the following November, brought against the executors, who pleaded, *inter alia*, that the leasehold premises were of no value, and that they had been unable, and would during the period in respect of which the rent was claimed be unable, to derive any profit or advantage out of the leasehold premises, the jury were unable to say whether the executors could have made any profits out of the premises, and the learned Judge at the trial thereupon gave judgment for the plaintiff for the year's rent. No question was left to the jury as to the value of the premises, although there was evidence that they were not value for the rent. *Held*, by the King's Bench Division and the Court of Appeal, that the judgment should be set aside. *Held*, by the King's Bench Division, and by Cherry, L.J., that the measure of the personal liability of the executors was the value of the premises; that their personal liability to this extent was not extinguished by the possession of the receiver, and that as the question of value had not been left to the jury there should be a new trial. *Held*, by the Court of Appeal (The Lord Chancellor and Holmes, L.J., *diss.* Cherry, L.J.), reversing the judgment of the King's Bench Division, that the personal liability of an executor who has entered into possession of a testator's leasehold property is limited to the profits which he makes, or by the exercise of due care, skill, and diligence could make, out of them; and that the appointment of the receiver, and the possession by him of the premises under the authority of a Court of competent jurisdiction, precluded the executors from making any profit during the period for which the rent claimed was payable, and that they were consequently entitled to have a verdict entered for them, and further, that the action was premature, as it would be impossible at the beginning of a year to ascertain by anticipation what profits could be made out of a particular holding during the ensuing twelve months. The protection afforded to an executor by an order for the administration of the testator's estate considered and explained by the Lord Chancellor. *Minford* v. *Carse*
[K.B. 245; APP. 253

—— Bank manager—Liability of Bank for acts in dual capacity - - 187, 214
See BANKER.

EXEMPTION—From rates — Buildings of a public nature and used for public purposes *See* RATES. [323

FINE.
See PENALTY.

FRANCHISE—Service - - - 17
See PARLIAMENT.

FRAUD—Insufficient allegation of—Conditional ordor for certiorari - - - 1
See DISQUALIFICATION.

—— Manager of bank—Executor and trustee—Liability of principals - 187, 214
See BANKER.

FRAUDS, STATUTE OF—Letting of land for less than a year - - - 318
See LANDLORD AND TENANT.

GAME — Trespass in pursuit of — Penalty not exceeding £5 imposed — Application of Small Penalties Act — Information on oath not necessary - - - 44
See TRESPASS IN PURSUIT OF GAME.

GRAZING—Letting for six months - 318
See LANDLORD AND TENANT.

HUSBAND AND WIFE—*Divorce proceedings —Costs of wife's solicitor—Compromise—Separate estate—Judgment against wife a bar to subsequent claim against husband.*] Where a divorce suit in which the wife was petitioner was settled without notice to her solicitors, who thereupon brought an action against her in which they recovered judgment, upon foot of which nothing was realized, and they afterwards applied for an order that the respondent, the husband, should pay them the wife's costs:—*Held*, by Madden, J., that the application should be refused, on the ground that there was evidence that the wife had separate estate, and that the solicitors looked to it for payment. *Held*, by the Court of Appeal, that the judgment obtained against the wife was a bar to any claim against the husband. *Priestly* v. *Fernie* (3 H. & C. 977) followed, and applied to the case of a debt incurred by a wife as agent for her husband. *Sullivan* v. *Sullivan* K.B. (MAT.) 116; [APP. 125

—— Marriage — Penal laws — Extra-territorial operation of statute - - - 289
See MARRIAGE. 1.

—— Marriage — Roman Catholics — One of the parties a Protestant within twelve months — Condition — Witnesses — Decrees of the Council of Trent and "Ne temere"
See MARRIAGE. 2. [445

INFANT—Action by next friend—Affidavit to remit—Visible means - - 144
See REMITTING ACTION TO COUNTY COURT.

—— Trespasser—Injuries to—Limit of owner's liability - - - - 95, 290
See NEGLIGENCE. 1.

INFORMATION—27 Geo. 3, c. 35 - 44
See TRESPASS IN PURSUIT OF GAME.

JUDGMENT—Against wife for costs of divorce proceedings — Bar to claim against husband - - - - 116, 125
See HUSBAND AND WIFE.

—— Authority of solicitor to issue execution 551
See NEW TRIAL.

JURISDICTION — Declining — Caretaker's agreement — Collateral contract 349
See CARETAKER.

—— Exclusive—Justice first seised of case 151
See JUSTICES.

—— Order of Justices — Sureties for good behaviour—Jurisdiction not shown *ex facie* [374
See SURETIES OF GOOD BEHAVIOUR. 2.

—— Service out of.
See SERVICE OUT OF THE JURISDICTION.

JUSTICES—*Surety of the Peace—Exclusive jurisdiction of Justice first seised of the case.*] *F.*, a resident magistrate, on an information in writing and on oath, made before him by *D.*, issued a warrant to arrest *B.* and bring him before *F.* to answer the complaint of *D.* requiring surety of the peace from *B.* *Held*, that *F.* had sole seisin of the case, and that other Justices of the district could not intervene in adjudicating on it without his consent. Prior to the hearing of the case against *B.*, a summons issued by *B.* demanding surety of the peace from *D.* had been heard and dismissed by *F.* and other Justices sitting at Petty Sessions. *Held*, that this did not affect the exclusive jurisdiction of *F.* in the case against *B.* *The King* (*Bransfield*) v. *Justices of County of Cork* K.B. [151

—— Conviction — Defect in — Not misleading—40 & 41 Vict. c. 56, sect. 76—Amendment - - - - - - 64
See WATER SUPPLY.

—— Cottier's tenancy — Demand of possession unnecessary—Notice to quit - 545
See COTTIER.

—— Declining jurisdiction—Caretaker—Collateral agreement - - - - 349
See CARETAKER.

—— Order Book—14 & 15 Vict. c. 93, s. 30 64
See ORDER BOOK.

—— Order for possession—14 & 15 Vict. c. 92, s. 15—Execution of warrant—Relation back - - - - - 95, 290
See NEGLIGENCE. 1.

—— Order for sureties of the peace and good behaviour—Jurisdictiou to be shown *ex facie* - - - - - 374
See SURETIES OF GOOD BEHAVIOUR. 2.

JUSTICES—*continued.*

—— Penalty for acting as district councillor or guardian while disqualified—Conviction—Summons—Negativing exception 1
See DISQUALIFICATION.

—— Poor rate—Warrant to levy—Addressed to sheriff - - - - - - 57
See POOR LAW.

—— Refusal of party aggrieved to prosecute—Summons — Incorporation in conviction - - - - - - - 64
See SURETIES OF GOOD BEHAVIOUR. 1.

—— Road — Entry to obtain materials for repair of — Contractor's application refused—Subsequent application by county surveyor - - - - - - 283
See COUNTY SURVEYOR.

—— Sanitary authority—Neglect to supply water to dwelling-house - - - 64
See WATER SUPPLY.

—— Sureties of the peace and good behaviour [64, 374
See SURETIES OF GOOD BEHAVIOUR. 1, 2.

—— Trespass in pursuit of game—Small Penalties Act—Information on oath not required
See TRESPASS IN PURSUIT OF GAME. [44

—— Withdrawal of summons—Not a bar to subsequent prosecution - - - 44
See WITHDRAWAL OF SUMMONS.

LANDLORD AND TENANT — *Contract—Letting of grazing for six months—Relation of landlord and tenant—Interest in land—Written memorandum—Deasy's Act*, 1860 (23 & 24 *Vict. c.* 154), *s.* 4.] The plaintiff, a landlady possessed of freehold lands, instructed an auctioneer to put up for sale by public auction the grazing of a certain portion of the said lands for a period of six months. In pursuance of such instructions the auctioneer duly offered the grazing for sale, and accepted the bid of the defendant, making at the time the following entry in his book:—"Miss Crane's meadows—Bernard Naughten, £13 10*s*." The plaintiff on learning the name of the purchaser refused to give him the grazing. The defendant, notwithstanding such refusal, put his cattle on the grazing, and kept them there. Plaintiff brought an action to recover possession and for an injunction, alleging there was no memorandum in writing of the contract sufficient to satisfy the Statute of Frauds. *Held*, that the contract was one "in respect to lands whereby the relation of landlord and tenant was intended to be created for a definite period of time" less than a year, within the terms of section 4 of Deasy's Act, 1860, and therefore did not require to be in writing. *Held*, also, that if the Statute of Frauds were applicable to such a

LANDLORD AND TENANT—*continued.*

contract, such note or memorandum as aforesaid would be insufficient to satisfy that statute. *Crane* v. *Naughten* - - - K. B. 318

—— Caretaker—Collateral agreement—Summary order for possession - - - 349
See CARETAKER.

—— Cottier tenancy—Notice to quit—Summary procedure—Demand of possession unnecessary - - - - - 545
See COTTIER.

—— Overholding — Demand of possession — Execution of warrant—Relation back—Injuries sustained by infant trespasser—Limits of landlord's liability 95, 290
See NEGLIGENCE. 1.

LEASE—Executor of lessee going into possession—Measure of liability for rent—Administration action—Receiver
See EXECUTOR. [245, 253

LOCAL GOVERNMENT— District councillor or guardian—Disqualification by absence—Penalty for acting while so disqualified
See DISQUALIFICATION. [1

—— Repair of road—County Surveyor—Application to enter for materials — Previous application of contractor refused — Res judicata - - - - - - 283
See COUNTY SURVEYOR.

—— Urban District Council—Election of chairman—Equality of votes - - 440
See URBAN DISTRICT COUNCIL.

LOST WILL—*Practice — Administration with the will annexed—Grant upon motion.*] When the assets are small, and all parties interested consent, the Court will grant administration with the will annexed, in respect of a lost will, upon motion. *In the Goods of M'Guirk* - K.B. (PROB.) 426

LUNATIC ASYLUM—Room occupied separately and exclusively by attendant — Whether occupied as dwelling-house
See PARLIAMENT. [17

MALICIOUS INJURY—*To property — Compensation—Malicious breaking of windows on successive days— Continuous act — Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97, *s.* 51) — *Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5.] *C.*, on being refused drink in *O's* public-house on a certain evening, went outside, and, after maliciously throwing a weight through one plate-glass window of the house, was about to break a second window with a hatchet, when he was stopped by an assistant of *O's*, whereupon he ran away. *C.* returned at 12 o'clock the following day and maliciously broke the second window. The value of each window was under, but the aggregate

MALICIOUS INJURY—*continued.*
value of the two windows exceeded, £5. *Held* (by the Lord Chancellor and Cherry, L.J., Holmes, L.J. *diss.*), that the wrongful acts of *C.* constituted one continuous transaction for which he could have been indicted under sect. 51 of the Malicious Damage Act, 1861, and that, accordingly, *O.* was entitled to compensation under sect. 5 (1) of the Local Government (Ireland) Act, 1898. *O'Neill, Applicant; County Council of the County Borough of Belfast, Respondents* - - - APP. 310

MARRIAGE—*Irish penal laws — Operation of statute, whether extra-territorial* — 19 *Geo.* 2, *c.* 13 (Ir.)] On appeal by the petitioner from the judgment of the Court of Appeal ([1910] 2 I.R. 140), the House of Lords affirmed the judgment of the Court of Appeal with costs. *Swifte* v. *Attorney-General* - - - - - - H. L. 289

2. —— *Marriage law—Marriage of Roman Catholics by Roman Catholic priest—Two witnesses, as required by decree of Council of Trent and decree "Ne Temere," not present—One of the parties a Protestant within previous twelve months—Conditional marriage*—19 *Geo.* 3, *c.* 13 (*Ir.*)—7 & 8 *Vict. c.* 81, *s.* 3—26 & 27 *Vict. c.* 90, *s.* 11, *sch.*—33 & 34 *Vict. c.* 110, *s.* 39.] A marriage solemnized in Ireland by a Roman Catholic priest, between two Roman Catholics, according to the ritual of the Roman Catholic Church in use in Ireland, but in the presence of only one witness, is by the law of the land valid, although it may not be valid by the law of the Roman Catholic Church, by reason of there not having been present two witnesses in addition to the priest, as required by the decree of the Council of Trent, "*De Reformatione Matrimonii*," and the decree "*Ne Temere*." Such marriage is valid, notwithstanding that one of the parties had been a Protestant within the preceding twelve months. The words in the Irish ritual, "If Holy Church will it permit," do not make the marriage contract conditional upon the marriage being in accordance with the law of the Roman Catholic Church. A marriage effected in accordance with the law of the land, and followed by cohabitation, is not invalidated by the fact that such marriage is void by the law of the Roman Catholic Church, and that the parties, had they known this, would not have entered into the marriage contract. *Ussher* v. *Ussher* - - - - - - K.B. 445

MASTER AND SERVANT — Service franchise - - - - - - 17
See PARLIAMENT.
—— Workmen's Compensation Act.
See WORKMAN.

MEMORANDUM—Parol contract—Statute of Frauds - - - - - - 318
See LANDLORD AND TENANT.

NEGLIGENCE — *Injuries sustained by infant trespasser — Landlord and tenant — Overholding — Demand of possession — Execution of warrant — Relation back*—14 & 15 *Vict. c.* 92, *sect.* 15—*Limit of liability of owners to infant trespasser on their premises.*] In an action to recover damages for personal injuries sustained through the negligence of the defendants, evidence was given that the plaintiff (who was a child of six years of age) resided with his parents in two rooms on the first floor of a tenement house; the parents had held these rooms on a weekly tenancy from the defendants: the stairs and landings were kept by the defendants under their own control. On the 8th of August, 1910, the defendant served a notice to quit upon the parents; this notice expired on the 15th: on the 16th demand of possession was made; on the 17th a summons under the Summary Jurisdiction (Ireland) Act, 1851, was issued to recover possession of the premises; on the 22nd the infant plaintiff fell through an open window, from which the lower sash had been removed, on the same landing as the rooms, to the yard below, a distance of some 24 feet, and was severely injured; on the 25th an order for possession was obtained from the magistrate. The following questions were left to the jury:—Was the window at the time unsafe for children resident in the house? Answer—"Yes." Was the plaintiff a child resident in the house at the time of the occurrence? Answer—"Yes." Did the defendants know that the landing would be used, and the window approached, by children resident in the house? Answer—"Yes." Did the defendants take reasonable precautions to prevent the window from being dangerous to young children resident in the house? Answer—"No." If you answer "No," then state what reasonable precautions they omitted. Answer—"Reasonable guard." Could the defendants have reasonably anticipated that the window might be taken from its sash, leaving an unprotected opening? Answer—"Yes." *Held*, affirming the judgment of the King's Bench Division, that the plaintiff was a trespasser, and that, notwithstanding the findings of the jury, the defendants were entitled to have a verdict and judgment entered for them. *Semble*, the removal of the sash by the defendants for the purpose of repair would not have made them liable for the accident. *Cooke* v. *Midland Great Western Railway of Ireland* ([1909] A.C. 229) distinguished. The liability of house-owners towards infant trespassers on their premises considered. *Coffee* v. *McEroy* K.B. 95; APP. 290

2. —— *Local authority — Liability, when interfering with road for the purposes of repair—Portion left open for use of public to be kept reasonably safe—Non-feasance while executing*

NEGLIGENCE—*continued.*

repairs.] A County Council who were under an obligation to maintain and repair the public roads within their jurisdiction, were engaged in repairing a portion of one of such roads, and for this purpose employed a steam-roller to roll down and level in the new metal; these repairing operations were confined to a portion half the width of the road, the other half being left open for public traffic. A man driving in a donkey-cart along the half so left open, proceeding in the same direction as the engine, and overtaking it, was jerked from his seat by the wheel of his cart colliding with a large stone lying in the water-table close to the grass margin on the side of the road opposite to the engine; the jerk threw the man into the road and under the wheels of the engine, where he received injuries from which he died; the stone (which had probably fallen off the fence bounding the road) had, to the knowledge of the Council's workmen, been in that position for two or three days previous to the accident. In an action under Lord Campbell's Act, the jury found that the defendants were negligent in omitting to remove the stone, and that there was no contributory negligence on the part of the plaintiff. *Held* (*per* Palles, C.B., and Wright, J., Kenny, J., *diss.*), that the act of interfering with the road imposed an obligation on the County Council to take care that the remaining portion left open for public use was reasonably fit and safe for such purpose, and that the Council were therefore liable in damages. *Ryan* v. *County Council of Tipperary North Riding* - - K.B. 392

NEW TRIAL—*Solicitor and client—Implied authority to issue execution after judgment—Trial—Misdirection—R. S. C. I.*, 1905, *Order XXXIX, R.* 7—"*Substantial wrong or miscarriage*"—*Joint tort-feasors—Verdict erroneously directed for one of several defendants—Jurisdiction to set aside on motion of co-defendant.*] After judgment in an action for a money demand, the solicitor for the plaintiff has implied authority to issue execution on the judgment, without any further or express instructions from his client, who is bound by and liable for the proceeding though tortious. *A.* retained *B.* as his solicitor to recover a small debt from *C.*, a retail shopkeeper. After some negotiation and part-payment, *B.* caused judgment to be marked for 6*d.* debt (admittedly due) and costs; and, without further instructions from *A.*, *B.* issued execution on the judgment under which *C.'s* goods were seized and kept possession of by the sheriff until *C.* paid the amount of the execution. The judgment was afterwards set aside, and *C.* brought an action for damages against *A.* and *B.* In this action the Judge at the trial, on the requisition of *A.'s* counsel, directed a verdict for him, and entered judgment in his favour with costs against *C.* on the ground that *B.'s* authority as his solicitor terminated with the entry of judgment in the action of *A.* v. *C.*, and that, in the absence of express instructions, *A.* was not liable for the acts of *B.* in issuing and levying execution against *C.*; and the jury found a verdict for £175 against *B.*, against whom judgment was entered for that amount with costs. *B.* moved to set aside both verdicts and judgments, on the ground of excessive damages, and of the misdirection in directing a verdict for *A.* *Held*, by the King's Bench Division and the Court of Appeal, that *B.* was not entitled to a new trial on the ground of excessive damages, but that there was misdirection. *Held*, by the Court of Appeal, reversing the judgment of the King's Bench Division (Kenny and Wright, JJ., from whom Palles, C.B., dissented), (*a*) that the Court had jurisdiction to set aside the judgment in favour of *A.* on *B's* motion, though *C.* had remained quiescent; (*b*) that under the circumstances of the case the misdirection was capable of inflicting injustice on *B.*, and that without speculating whether or not this in fact occurred, the case did not come within Order XXXIX, R. 7; and that the judgments in favour of *A.* and against *B.* should therefore both be set aside, and a new trial had of the action. *Purnell* v. *Great Western Railway Co. and Harris* (1 Q. B. D. 636) followed. *Sandford* v. *Porter and Waine* - APP. 551

NON-FEASANCE—Road authority - 392
See NEGLIGENCE. 2.

NOTICE—Of accident—Failure to serve within prescribed time — Workmen's Compensation Act, 1906, s. 4 - - 129
See WORKMAN. 2.

—— Of agent's fraud — Constructive—Bank and branch - - - - 187, 214
See BANKER.

—— To quit—Cottier — Summary procedure — Demand of possession unnecessary 545
See COTTIER.

NOVATION—*Contract — Appropriation of payments — Limited Company — Liability of parties constituting a partnership which is subsequently registered as a limited company for goods supplied to the partnership—Continuous account—Subsequent division and re-arrangement thereof.*] *W. G.* and *G. P.* formed themselves into a partnership called the Simpitrol Lighting Company, and entered into a written agreement with the plaintiffs, upon foot of which goods were supplied to such company. In the course of a few months after its inception, the Simpitrol Lighting Company was duly registered as a limited company, and the plaintiffs continued to supply goods under the written

NOVATION—*continued.*
agreement aforesaid to the new limited company, and kept the account thereof in their ledgers as one continuous account. The company, while unregistered, made no payments to the plaintiffs, but did make considerable payments while registered as a limited company. Finding difficulty in getting payment of their accounts, the plaintiffs divided and re-arranged the account in their ledger, appropriating the payments made as against the goods supplied to the new limited company, and sued *W. G.* and *G. P.* on the written agreement for the goods supplied to the company while it was unregistered. *Held*, that on these facts the plaintiffs were entitled to succeed. *Pitner Lighting Co.* v. *Geddis and Pickering* - - K.B. 163

ORDER — Justices — Sureties of the peace and good behaviour—Jurisdiction *ex facie* [374
See SURETIES OF GOOD BEHAVIOUR. 2.

ORDER AND DISPOSITION—Bill of sale—Bankruptcy of grantor before anything due - - - - - - 170
See BILL OF SALE.

ORDER BOOK—*Justices—Petty Sessions* (*Ireland*) *Act*, 1851 (14 & 15 *Vict.* c. 93) ss. 21, 36—"*Cause of Complaint.*"] *Per* Palles, C.B., and Gibson, J. The present form of Petty Sessions order-book approved of by the Lord Lieutenant in Council in purported exercise of the power given by s. 36 of the Petty Sessions (Ireland) Act, 1851, is not authorized by that section, and is, *per* Palles, C.B., inconsistent with the spirit and intention of the Act, *per* Gibson, J., inaccurate and misleading, in so far as it alters the heading "Cause of Complaint" in the form of order-book originally prescribed by the schedule to the Act, to "Cause of complaint as set forth in summons." But *held*, *per Curiam*, that a conviction founded on a summons, which conviction set out on its face a good cause of complaint, was not invalidated merely by reason of the entry being in such present form. *The King* (*U. D. C. of Athy*) v. *Justices of Co. Kildare*; *The King* (*Donoghue*) v. *Justices of Co. Cork* - - - K.B. 64

ORDERS, GENERAL—1898 (22nd December) Application of Enactments, - 10 (3), Art 12 (9), (11) - - - - 1
See DISQUALIFICATION.
—— 1905 (Feb. 22)—XI, R. 1 (*e*) - 55
See SERVICE OUT OF THE JURISDICTION.
—— —— XXXVI, R. 5 - - - 147
See COLLISION.
—— —— XXXIX, R. 7 - - - 551
See NEW TRIAL.
—— —— XLIX, R. 3 - - - - 147
See COLLISION.

OVERHOLDING—Demand for possession—Order of Justices—Execution of warrant—Relation back—Trespasser—Infant
See NEGLIGENCE. 1. [95, 290

PARLIAMENT—*Registration of voters—Service franchise—Attendant in Lunatic Asylum—Separate and exclusive occupation of room, whether as bedroom only or as dwelling-house.*] An attendant in a lunatic asylum had the separate and exclusive use and occupation of a room in the asylum, primarily used as a bedroom. There are in the asylum a dining-room and recreation-room for the attendants, but each attendant is at liberty to receive guests in his own room, and it is the practice for the attendant when off duty to read in his private room and to provide himself there with food or delicacies in addition to the meals supplied in the dining-room. Each attendant has a key to his room, but the same key opens all the rooms in the block. He cannot light a fire in his room without leave of the medical superintendent. The attendants have no contractual right to any special rooms, but in practice they are never moved from one to another. They use the rooms as sitting- as well as bed-rooms. The furniture belongs to the asylum, but any decorations belong to the attendants. The outer gate of the asylum is closed at a particular hour at night, after which no attendant is allowed in or out without special leave. The Revising Barrister found as a fact that the room occupied by an attendant, whose name appeared on the list of registered voters and was objected to, was a dwelling-house, and occupied as such by the attendant during the qualifying period. *Held*, by Lord O'Brien, L.C.J., and Holmes, L.J., *diss.* Cherry, L.J., that there was no evidence, on which the Revising Barrister could properly act, that the occupation of the room by the attendant was as a dwelling or dwelling-house within the meaning of the Act, 48 Vict. c. 3, s. 3, or otherwise than as a bedroom merely. *Stribling* v. *Halse* (16 Q. B. D. 246) is not a binding decision in this country. *Held*, by Cherry, L.J., that independently of *Stribling* v. *Halse* there was, on unimpeached authorities in England and Scotland, evidence to support the finding of the Revising Barrister. *O'Brien* v. *M'Carthy* - - APP. 17

PAYMENT — Syndicate turned into limited company — Goods supplied to both — Payments made by company - 163
See NOVATION.

PENALTY—Building contract — Non-completion within contract time—Engineer's certificate - - - - 356
See BUILDING CONTRACT.
—— District Councillor or Guardian acting while disqualified by non-attendance -
See DISQUALIFICATION.

PENALTY—*continued.*
—— Game Laws—Fine under £5—Small Penalties Act - - - - - - 44
See TRESPASS IN PURSUIT OF GAME.
—— Rules imposing—Creamery Society - 586
See RESTRAINT OF TRADE.
—— Sanitary Authority—Non-supply of water
See WATER SUPPLY. [64

POOR LAW—*Justices — Jurisdiction—Addressing of warrant to levy poor rate to High Sheriff*—Certiorari.] On a complaint before them by a rate-collector in respect of the non-payment of poor rate, Justices of the Peace made an order that the defendant to the complaint should pay the poor rate demanded and the costs of the complaint, and in default of such payment, that the rate and costs should be levied by distress and sale of the defendant's goods. The complainant applied that the warrant for distress should be directed to the district inspector of constabulary, but the Justices refusing the complainant's application, and notwithstanding that there was no nomination of or consent to act by the high sheriff, directed the warrant to the high sheriff for execution. *Held*, that the Justices had no jurisdiction to direct the warrant to the high sheriff for execution, and that their order was bad and should be quashed. *The King* (*Hynes*) v. *Justices of Clare* - - K.B. 57

—— Guardian — Disqualification by absence — Penalty - - - - - - 1
See DISQUALIFICATION.

PRACTICE—Certiorari.
See CERTIORARI.
—— Execution—Authority of solicitor to issue
See NEW TRIAL. [551
—— Lost will—Administration *c. t. a.*—Grant on motion - - - - - - 426
See LOST WILL.
—— Misdirection—Order XXXIX., R. 7 551
See NEW TRIAL.
—— New trial—Application by one defendant to set aside verdict for co-defendant 551
See NEW TRIAL.
—— Remitting to county court — Affidavit — Visible means—Infant plaintiff - 144
See REMITTING ACTION TO COUNTY COURT.
—— Service out of the jurisdiction - 55
See SERVICE OUT OF THE JURISDICTION.
—— Transfer to Admiralty side of King's Bench Division—Action for collision - 147
See COLLISION.

PRINCIPAL AND AGENT—Bank manager—Trustee for customer—Fraud—Liability of principal - - - 187, 214
See BANKER.

PRINCIPAL AND AGENT—*continued.*
—— Wife sued as husband's agent—Judgment against her a bar to proceedings against husband for same debt - - 116, 124
See HUSBAND AND WIFE.

PRINCIPAL AND CONTRACTOR—Workmen's Compensation Act, 1906, s. 4—Alternative statutory liability—Election by applicant - - - - 129
See WORKMAN. 2.

PUBLIC PURPOSES—Buildings used for 328
See RATES.

RATES—*Exemption—Hereditaments and buildings used for public or exclusively charitable purposes—University College—Fees paid by studente bound by charitable trust—Parliamentary control over funds*—15 & 16 *Vict. c.* 63, *s.* 16—17 & 18 *Vict. c.* 8, *s.* 2—*Irish Universities Act*, 1908 (8 *Edw.* 7, *c.* 38).] University College, Cork, one of the constituent Colleges of the National University of Ireland, provided the highest class of education and instruction, and was open to all His Majesty's subjects: fees were charged to all students; these fees, however, were not payable to the professors, but were brought into the general funds of the College; the College was bound to present annual accounts of all receipts and expenditure to the Controller and Auditor-General, and these accounts, together with the report of the Controller and Auditor-General, were to be laid before Parliament. *Held*, that on these facts the hereditaments and buildings of the College were exempt under the Irish Rating and Valuation Code, on the grounds that such heraditaments and buildings were altogether of a public nature and used for public purposes. Judgment of King's Bench Division ([1911] 2 I. R. 593) affirmed. *Governing Body of University College, Cork, Appellants; Commissioner of Valuation, Respondent.*
[APP. 328
—— Poor rate—Warrant to levy—Sheriff 57
See POOR LAW.
—— Water rate — Tender — Water supply to dwellinghouse - - - 64
See WATER SUPPLY.

RECEIVER—Administration Action—Executor in possession of testator's leasehold—Measure of liability for rent 245, 253
See EXECUTOR.

REMITTING ACTION TO COUNTY COURT — *Practice — Action of tort — Infant plaintiff suing by next friend — Allegation of absence of visible means—Sufficiency of affidavit—Common Law Procedure Act* (*Ireland*), 1870, *s.* 6.] On an application, under s. 6 of the Common Law Procedure Act (Ireland), 1870, to remit an action of tort brought by an infant plaintiff suing by

REMITTING ACTION TO COUNTY COURT—*continued.*
next friend, it is sufficient that the affidavit of the defendant should state that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff; and it is not necessary to state further that the next friend has no such means. *Pender* v. *Leonard* - - - - - - K.B. 144

RENT—Payable in advance—Executor in possession of testator's leasehold—Administration action—Receiver—Liability to rent—Extent of - - 245, 253
See EXECUTOR.

RES JUDICATA — Entry to obtain materials for repair of road—Application by contractor refused—Subsequent application by County Surveyor - 283
See COUNTY SURVEYOR.

RESTRAINT OF TRADE—*Creamery Society registered under the Industrial and Provident Societies Act*, 1893—*Rules—Imposition of penalties—Ambiguity—Unreasonableness.*] One of the rules of a limited Co-operative Creamery Society duly registered under the Industrial and Provident Societies Act, 1893, provided that any milk-supplying member should, so long as he remained a member of the Society, deliver to the Society's Creamery on every working day all the milk produced from his cows (except such as might be required for use in his household), and in accordance with the regulations laid down by the committee for the delivery of milk; and that any member failing to do so should pay to the Society as liquidated damages one shilling per cow per day for every cow's milk not so delivered. The rules did not provide for the voluntary withdrawal of a member from the society except by transfer of his shares, to which the consent of the committee was necessary, and they did not contain any definition of "milk-supplying member." *Held*, by the Court of Appeal, reversing the judgment of the King's Bench Division, that the rule requiring delivery of milk as above stated was void as an illegal restraint of trade. *Held* also, by Cherry, L.J., that it was too ambiguous to justify the award of penalties. *Tipperary Co-operative Creamery Society* v. *Hanley* - - APP. 586

REVENUE—Estate duty—Aggregation 606
See ESTATE DUTY.

ROAD—Interference with, in part by authorized body for purposes of repair — Non-feasance—Obstruction on part left open for traffic - - - - 392
See NEGLIGENCE. 2.

—— Repair of—Entry for materials—Application by contractor refused—Subsequent application by County Surveyor - 283
See COUNTY SURVEYOR.

ROMAN CATHOLICS—Marriage between—Witnesses—Papal decrees - 445
See MARRIAGE. 2.

RULES—Creamery Society—Penalties - 586
See RESTRAINT OF TRADE.

SANITARY AUTHORITY—Water supply to dwellinghouse - - - 64
See WATER SUPPLY.

SERVICE FRANCHISE — Attendant in Lunatic Asylum - - - 17
See PARLIAMENT.

SERVICE OUT OF THE JURISDICTION — *Practice — Writ of summons — Breach within the jurisdiction of a contract made in the Isle of Man—Order XI, Rule* 1 (*e*).] A trader, resident and carrying on business in the Isle of Man, ordered goods from a company carrying on business as bacon-curers in Ireland, through the company's traveller. From transactions between the trader and the company, it appeared that upon such orders, goods were supplied by the company directly to the trader, and payment was made by the latter by cash order sent directly to the company in Ireland. Upon an application on behalf of the company for liberty to serve the trader out of the jurisdiction with a writ of summons for the price of goods sold to him through the company's traveller, liberty to serve the trader out of the jurisdiction was granted on the ground that, having regard to the course of dealing between the parties, the intended action was founded upon a breach within the jurisdiction of the contract made by the company's agent within the meaning of Order XI, Rule 1 (*e*). *O'Mara* v. *Dodd* [K.B. 55

SHERIFF—Warrant to levy poor rate - 57
See POOR LAW. 1.

SHIP—Collision—Action for damages—Transfer to Admiralty side - - - 147
See COLLISION.

SOLICITOR—Authority to issue execution after judgment - - - - 551
See NEW TRIAL.

—— Costs - - - - 116, 125
See HUSBAND AND WIFE.

STATUTE OF FRAUDS.
See FRAUDS, STATUTE OF.

STATUTES:
7 Wm. 3 (Ir.), c. 12 - Statute of Frauds, s. 4
See LANDLORD AND TENANT [318
19 Geo. 3 (Ir.) c. 13—Marriages 289, 445
See MARRIAGE. 1, 2.
27 Geo. 3 (Ir.) c. 35 — Preservation of Game, ss. 10, 19 - - - - [44
See TRESPASS IN PURSUIT OF GAME
6 & 7 Wm. 4, c. 116—Grand Juries, s. 162
See COUNTY SURVEYOR [283

STATUTES—*continued.*
7 & 8 Vict. c. 81—Marriage, s. 3 - 445
See MARRIAGE. 2.
10 Vict. c. 16—Commissioners Clauses, ss. 37, 38 - - - - - - - - 440
See URBAN DISTRICT COUNCIL.
10 Vict. c. 17—Waterworks Clauses, ss. 44, 45 [64
See WATER SUPPLY.
14 & 15 Vict. c. 92—Summary Jurisdiction, s. 15 - - - - - 95, 290
See NEGLIGENCE.
14 & 15 Vict. c. 93—Petty Sessions, ss. 21, 36 [64
See ORDER BOOK.
—— —— s. 39 - - - - - - - 1
See DISQUALIFICATION.
15 & 16 Vict. c. 63—Tenement Valuation, s. 16 [328
See RATES.
17 & 18 Vict. c. 8—Tenement Valuation, s. 2 [328
See RATES.
20 & 21 Vict. c. 60—Bankruptcy, s. 313 170
See BILL OF SALE.
23 & 24 Vict. c. 154—Landlord and Tenant s. 4 [318
See LANDLORD AND TENANT.
—— —— s. 86 - - - - - 349, 545
See CARETAKER.
COTTIER.
24 & 25 Vict. c. 97—Malicious Damage, s. 51 [310
See MALICIOUS INJURY.
24 & 25 Vict. 100—Offences against the person, s. 42 - - - - - - - 64
See SURETIES OF GOOD BEHAVIOUR. 1.
25 & 26 Vict. c. 50—Justice of the Peace, s. 9 [64
See SURETIES OF GOOD BEHAVIOUR. 1.
26 & 27 Vict. c. 90—Marriage, s. 11, sch. 445
See MARRIAGE. 2.
32 & 34 Vict. c. 109—Common Law Procedure, s. 6 - - - - - - 144
See REMITTING ACTION TO COUNTY COURT.
33 & 34 Vict. c. 110—Marriage, s. 39 445
See MARRIAGE. 2.
36 & 37 Vict. c. 82—Small Penalties, ss. 4, 6
See TRESPASS IN PURSUIT OF GAME. [44
40 & 41 Vict. c. 56—County Courts and Officers, s. 76 - - - - - - 64
See WATER SUPPLY.
—— —— s. 78 - - - - - - 1
See DISQUALIFICATION.
40 & 41 Vict. c. 57—Judicature, ss. 9, 48 147
See COLLISION.
—— —— s. 27 (4), s. 28 (6) - - 535
See ASSIGNMENT OF DEBT.
46 Vict. c. 7—Bills of Sale, s. 7 - - 170
See BILL OF SALE.
48 Vict. c. 3—Representation of the People, s. 3 - - - - - - - 17
See PARLIAMENT.

STATUTES—*continued.*
56 & 57 Vict. c. 39—Industrial and Provident Societies, s. 10 - - - - 586
See RESTRAINT OF TRADE.
57 & 58 Vict. c. 30—Finance, s. 4, s. 5 (3) 606
See ESTATE DUTY.
60 & 61 Vict. c. 66—Judicature, s. 6 - 147
See COLLISION.
61 & 62 Vict. c. 37—Local Government, s. 5 (1) [310
See MALICIOUS INJURY.
63 & 64 Vict. c. 7—Finance, s. 12 (2) - 606
See ESTATE DUTY.
6 Edw. 7, c. 50—Workmen's Compensation, s. 1 (1) - - - - - 430, 529
See WORKMAN. 1, 3.
—— —— s. 4 - - - - - - 129
See WORKMAN. 2.
7 Edw. 7, c. 13—Finance, s. 16 - - 606
See ESTATE DUTY.
8 Edw. 7, c. 38—Irish Universities - 328
See RATES.

SUMMONS—Negativing exception — Statutory offence - - - - - - - 1
See DISQUALIFICATION.
—— Refusal to prosecute—Incorporation in conviction - - - - - - 64
See SURETIES OF GOOD BEHAVIOUR. 1.
—— Withdrawal of—Whether a bar to subsequent prosecution - - - - - 44
See WITHDRAWAL OF SUMMONS.
—— Writ of—Service out of the jurisdiction - - - - - - 55
See SERVICE OUT OF THE JURISDICTION.

SURETIES OF GOOD BEHAVIOUR — *Justices—Assault—Party aggrieved declining to prosecute—Conviction*—24 & 25 *Vict. c.* 100, *s.* 42—*Order—Recital in complaint sufficient*—25 & 26 Vict. c. 50, s. 9.] When Justices convict summarily of an assault under 24 & 25 Vict. c. 100, s. 42, they may further order the defendant to find sureties for good behaviour. *Quære*, *per* Lord O'Brien, L.C.J., and Gibson, J., when the Justices acquit of the assault, but direct the defendant to find sureties for good behaviour, must the order state on its face facts showing jurisdiction to give such direction? In a conviction by Justices under 24 & 25 Vict. c. 100, s. 42, for assault, upon a summons issued by a person other than the party aggrieved, under the provisions of 25 & 26 Vict. c. 50, s. 9, the complaint as set out in the conviction contained an averment, following the form of the summons, which contained a similar averment, that the party assaulted had declined to prosecute. *Held*, that the conviction was good, and that it was not necessary that the conviction should state that the Justices had found that the party aggrieved had declined to prosecute.

SURETIES OF GOOD BEHAVIOUR—*continued.*

Rex (*Johnston*) v. *Justices of Co. Armagh* (43 I. L. T. R. 112) not followed. *The King* (*Donoghue*) v. *Justices of County Cork* - - K.B. 64

2. —— *Justices—Order to find sureties for the peace and good behaviour—Showing jurisdiction on face of order*—Bona fide *question of title involved.*] An order of Justices requiring a person to find sureties to keep the peace and be of good behaviour must show on its face facts necessary to give the Justices jurisdiction to make such order. So *held* by Palles, C.B., and Gibson, J. (Lord O'Brien, L.C.J., *dubitante*). The prosecutor was charged as defendant on the prosecution of a head constable of the Royal Irish Constabulary on a summons in the following form:—"Whereas a complaint has been made to me that you, the defendant, on the 6th day of November, 1911, at . . . did unlawfully assault John Begley and James Begley of . . . , and to show cause why you should not be bound to be of the peace and good behaviour." The case was heard by the Justices at Petty Sessions. It appeared from the evidence that an assault had been committed by the defendant, arising out of a dispute involving a *bona fide* question of title. The magistrates made an order which was entered in the order book. It set out the complaint as in the summons, and ordered that the defendant should enter into security by recognizance to keep the peace and be of good behaviour for twelve months, and in default should be imprisoned. *Held*, by Palles, C.B., and Gibson, J.; Lord O'Brien, L.C.J., *dubitante*, that the order did not show jurisdiction on its face and should be quashed on *certiorari*. The question whether Justices have power to bind to the peace where a *bona fide* question of title is raised, considered. *The King* (*Boylan*) v. *Justices of the County of Londonderry* - - - - - - - K.B. 374

—— Exclusive jurisdiction - - - 151
See JUSTICES.

SURVEYOR—County - - - 283
See COUNTY SURVEYOR.

TENDER—Of rates—Water supply to dwelling-house - - - - - - 64
See WATER SUPPLY.

TRADE—Illegal restraint of - - 586
See RESTRAINT OF TRADE.

TRANSFER TO ADMIRALTY SIDE—Collision - - - - - - 147
See COLLISION.

TRESPASS—Infant—Injuries sustained by—Limits of liability of owners of premises
See NEGLIGENCE. 1. [95, 290

TRESPASS IN PURSUIT OF GAME—27 *Geo.* 3, *c.* 35, *ss.* 10, 19—*Small Penalties Act*, 1873—*Absence of information on oath.*] The Small Penalties Act, 1873 (36 & 37 Vict. c. 82), applies to convictions for offences relating to game under 27 Geo. 3, c. 35, where the penalty adjudged to be paid does not exceed £5. It is not necessary that, prior to issuing a summons for an offence under 27 Geo. 3, c. 35, there should be an information on oath. *The King* (*McDonnell*) v. *Justices of Tyrone* - - - - - - - K.B. 44

TRIAL—New — Misdirection — Order XXXIX, R. 7 - - - - - - 551
See NEW TRIAL.

TRUSTEE—For customer of bank—Fraud of branch manager—Liability of bank
See BANKER. [187, 214

UNIVERSITY—Buildings — Exemption from rates - - - - - - 328
See RATES.

UNREASONABLENESS—Rule of Industrial Society - - - - - - 586
See RESTRAINT OF TRADE.

URBAN DISTRICT COUNCIL—*Chairman—Election of, at annual meeting—Equality of votes—Selection by lot*—10 *Vict. c.* 16 (*Commissioners Clauses Act*, 1847), *ss.* 37, 38.] If, at an annual election of Chairman of an Urban District Council for the ensuing year, an equal number of votes be given for two candidates, the choice of one of them as such chairman is to be decided by lot. The outgoing chairman, though presiding, has not a casting vote. *The King* (*Burke*) v. *McCarthy* [APP. 440

VISIBLE MEANS—Infant plaintiff—Affidavit to remit - - - - - - 144
See REMITTING ACTION TO COUNTY COURT.

WATER SUPPLY—*Justices—Summary conviction—Defect cured—Power to amend*—40 & 41 *Vict. c.* 56, *s.* 76—*Sanitary authority—Water supply—Order of Justices imposing penalties for neglecting to supply water to house, not described as dwelling-house—Penalties imposed for neglect to supply water after seven days from request and payment of water-rate—No statement of tender of rate—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 44, 45).] *M.* issued a summons against the Athy Urban District Council, the sanitary authority of the district, complaining that she, being the occupier of a house in the district, the annual value of which did not exceed £10, and having paid to the District Council the amount of water-rate for one quarter and requested them to lay down communication-pipes and other necessary works for the supplying of the said house with

WATER SUPPLY—*continued.*
water for domestic use, the District Council neglected within seven days, and still neglected, to lay down such communication-pipes and other necessary works. An order was made by the Justices at Petty Sessions reciting the summons, finding the facts mentioned therein, and ordering the defendants to forfeit to the complainant the sums mentioned in the order. The Act in question provides for the supply of water, not to houses generally, but to dwelling-houses. It did not appear on the face of the order that the house in the present case was a dwelling-house. The defendants obtained a conditional order for a writ of *certiorari* to quash the order of the Justices on the ground (*inter alia*) that it was bad on its face inasmuch as it did not state that the complainant was the occupier of a dwelling-house. It appeared from affidavits filed in the matter that the house was, in fact, a dwelling-house, and that this was not disputed at the hearing before the Justices. *Held*, the Court being satisfied that the house was in fact a dwelling-house, and that the omission of the word "dwelling" did not mislead or prejudice the defendants, or affect the merits of case, that assuming the order to be defective by reason of the omission of the word "dwelling," the defect was cured by the provision in s. 76 of the 40 & 41 Vict. c. 56, that no conviction shall be held void or quashed by reason of any defect, omission, or variance in the summons, &c., upon which the same shall purport to have been made, provided same shall not have misled or prejudiced the defendant, or affected the merits of the case. *Per* Palles, C.B. The subsequent clause in s. 76, giving power to amend a summons, charge, or information, does not apply to *certiorari* proceedings in the King's Bench Division. *The King* (*U.D.C. of Athy*) v. *Justices of Co. Kildare* [K.B. 64

WIFE.
See HUSBAND AND WIFE.

WILL—Lost—Proof of, on motion - 426
See LOST WILL.

WINDOWS—Maliciously breaking on successive days—Continuous act - 310
See MALICIOUS INJURY.

WITHDRAWAL OF SUMMONS—*Effect of—Justices—Summary Jurisdiction.*] An order of Justices permitting a summons for an offence punishable on summary conviction to be withdrawn does not amount to an acquittal of the defendant, and a fresh summons may subsequently be issued for the same offence. The statement in *Pickavance* v. *Pickavance* ([1901], P. 60) at p. 63, that the withdrawal of a summons puts an end to the complaint, dissented from. *The King* (*McDonnell*) v. *The Justices of Tyrone* - - K. B. 44

WORDS—"Consent of true owner"—20 & 21 Vict. c. 60, s. 313 - - - 170
See BILL OF SALE.

—— "Now"—33 & 34 Vict. c. 110, s. 39 445
See MARRIAGE. 2.

—— "Out of . . . the employment"—6 Edw. 7, c. 50, s. 1 (1) - - - - 430
See WORKMAN. 1.

WORK—Interchange of—Common employment by different masters - - - 529
See WORKMAN. 3.

WORKMAN—*Workmen's Compensation Act*, 1906—*Accident, whether arising "out of" the employment—Herd cycling between two farms on which he was employed—Risk unconnected with employment.*] A herd who was employed to look after the stock on two farms, on one of which he lived, was starting on a bicycle to traverse the distance between them (535 yards) along a public road when a dog, his own property, collided with the bicycle and knocked it down, and the herd thereby sustained injuries from the fall which caused his death. *Held*, that the accident did not arise "out of" the employment and that his dependants were not entitled to compensation. An accident does not arise "out of" the employment unless caused by risk peculiar to that particular employment, and not common, at least in an equal degree, to the general public. *Greene*, *Applicant*; *Shaw*, *Respondent*. APP. 430

2. —— *Workmen's Compensation Act*, 1906, *sect. 4—Principal and contractor—Obligation on applicant to elect which is sought to be made liable for compensation—Award against one, though partly fruitless, a bar to proceedings under the Act against the other—Notice of accident—Claim—Delay beyond prescribed period—Excuse.*] An applicant who seeks to avail of the provisions of section 4 of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 50), must elect whether he will proceed against the contractor or the principal, their statutory liability for compensation in cases of accident being alternative, and neither joint nor joint and several. Accordingly, where a workman obtained an award against the contractor who employed him, but in consequence of the bankruptcy of the contractor and liquidation of the Insuring Company, was unable to realize more than a small portion of the amount awarded. *Held*, affirming the decision of the Recorder of Dublin (The Right Hon. Thomas L. O'Shaughnessy, K.C.), that he could not subsequently recover the balance of the award from the principal. *Herd* v. *Summers*, 7 Fraser (5th series) 870, followed. *Held*, further, that failure to serve notice of accident and clai on the principal within the prescribed time was

WORKMAN—*continued.*
also an answer to any claim against the principal. *Meier, Applicant; Lord Mayor, &c., of Dublin, Respondents* - - - - App. 129

3. —— *Workmen's Compensation Act*, 1906, *s.* 1 (1)—*Workmen engaged by different masters in a common employment—Interchange of work with knowledge and permission of employers—Custom of port—Unloading collier—Evidence.*] Four men were engaged in the unloading of a collier. Three of these, a tipper and two winchmen, were employed by the shipowner; the fourth, a barrow-man, was employed by the coal merchant who chartered the ship. The tipper got tired of his work, and asked the barrow-man to exchange work with him, which was done, the barrow-man tipping the tubs of coal as they were hoisted from the hold into the barrow, and the tipper wheeling off the barrow when full. While the barrow-man was thus occupied in tipping he was accidentally knocked into the hold by a tub and was killed.

WORKMAN—*continued.*
The three surviving workmen proved that it was the habit of men so employed at the port to interchange work in this manner when unloading colliers, and there was no evidence to the contrary, and the employers did not deny their knowledge of the practice, or allege that they prohibited it. There was no other evidence of any custom to interchange work at the port when unloading coal. *Held*, that no such custom was proved; but that, as the four men were at the time of the accident engaged in the common employment of getting the coal from the ship to the premises of the coal merchant, the interchange of work was in the nature of a deviation from the workman's special employment for the benefit, and with the sanction, of the employer; that the accident arose out of and in the course of the deceased's employment; and that his dependants were entitled to compensation. *Henneberry, Applicant; Doyle, Brothers, Respondents* - - - App. 529

THE END.

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